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No. 88-___

In The

Supreme Court of the United States

October Term, 1988

Ernest V. PARISIEN,
D/B/A/ PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Turtle Mountain Chippewa Tribal Court have jurisdiction over a civil action for payment for work performed, brought by a tribal member subcontractor against a non-Indian general contractor who, under a federal contract, built a nearly eight million dollar tribal school on reservation trust land for attendance primarily by Indian students, where there are no federal treaties or statutes limiting the Tribal Court's jurisdiction?

2. When the highest court of the Turtle Mountain Chippewa Tribe has construed a provision of the Tribal Code, may a federal court substitute its own interpretation of that provision?

3. If a federal court may substitute its interpretation of the Tribal Code for that of the highest tribal court, did the lower court err in finding that the Tribal Code does not authorize the Tribal Court to take jurisdiction over a tribal member's contract action against a non-Indian contractor, who came onto reservation trust land to perform a nearly eight million dollar federal contract to build a tribal school for attendance primarily by Indian students, and who subcontracted with a tribal member to perform part of the work?

4. When the Tribal Council amends the Tribal Code to clarify that under the Code the Tribal Courts have jurisdiction over an action brought by a tribal member against a non-Indian performing a contract on the reservation, does the amended provision apply to confer jurisdiction over an ongoing action in Tribal Court?

LIST OF PARTIES

The parties to the proceedings in the Court of Appeals were Ernest V. Parisien, doing business as Parisien Excavation; Twin City Construction Company of Fargo, North Dakota; and United States Fidelity and Guaranty Company. The Turtle Mountain Band of Chippewa Indians was granted leave to file a brief *amicus curiae* in support of Ernest V. Parisien, and to participate in oral argument before the three-judge panel and on rehearing *en banc*.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner ERNEST V. PARISIEN respectfully prays that a Writ of *Certiorari* issue to review the *en banc* judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on January 11, 1989.

OPINIONS BELOW

The *en banc* judgment and dissenting opinion of the Court of Appeals for the Eighth Circuit, entered January

11, 1989, are reported at 866 F.2d 971, available on Westlaw, and reprinted in the Appendix hereto at pages A-1 through A-4, *infra*. The order granting rehearing *en banc*, filed November 10, 1988, is reprinted in the Appendix at page A-5. The opinion and dissenting opinion of the three-judge panel of the Court of Appeals, entered September 20, 1988, vacated by the granting of rehearing *en banc*, are available on Westlaw, and reprinted in the Appendix at pages A-6 through A-21.

The District Court's memorandum and order, entered August 24, 1987, is unpublished, and reprinted in the Appendix hereto at pages A-22 through A-26. The Magistrate's report and recommendation, filed June 30, 1987, is unreported, and reprinted in the Appendix at pages A-27 through A-37.

The memorandum opinion of the Turtle Mountain Court of Appeals, issued June 6, 1986, is reported at 16 Indian L. Rep. 6012, and reprinted in the Appendix hereto at pages A-38 through A-47. The judgment of the Turtle Mountain Tribal Court, entered May 3, 1985, is unpublished, and reprinted in the Appendix at pages A-48 through A-49.

JURISDICTION

The judgment and opinion of the three-judge panel of the Court of Appeals for the Eighth Circuit were entered on September 20, 1988. A timely petition for rehearing *en banc* was filed on September 30, 1988. Rehearing *en banc* was granted November 10, 1988, vacating the panel's opinion. The *en banc* judgment and dissenting opinion of

the Eighth Circuit Court of Appeals were entered January 11, 1989. This petition for writ of *certiorari* is filed on March 31, 1989, within ninety (90) days of January 11, 1989.

This Court has jurisdiction to review the *en banc* judgment of the Court of Appeals for the Eighth Circuit under 28 U.S.C. § 1254(1) (1948).

STATUTES INVOLVED

The statutes involved are set out verbatim as follows:

A. Title 2, Turtle Mountain Tribal Code (before amendment in 1987):

> *Jurisdiction.*
> (1) The Tribal Court shall have jurisdiction over all civil matters where all parties are Indians within the jurisdiction of the Court. The Tribal Court shall have civil jurisdiction over non-Indians in any particular case where they submit themselves to the jurisdiction of the Court by instituting an action against an Indian and filing cash bond in the amount of the damages asked, or by submitting himself to the Court's jurisdiction.

2 T.M.T.C. § 2.0102(1) (1976).

B. Title 2, Turtle Mountain Tribal Code (as amended in 1987):

> *Jurisdiction.*
> (1) The Tribal Court shall have general and original jurisdiction in all civil actions to the extent permitted by the Tribal Constitution and by the laws of the United States. Such jurisdiction shall include, but not be limited to, jurisdiction over the following:

(a) Business transactions conducted within the territorial jurisdiction of the Tribal Court as defined in Section 2.0102(3) of this Code; and

(b) Contracts to be performed within the Court's territorial jurisdiction, including contracts to insure any person, property, or risk, located within the Court's territorial jurisdiction; and

(c) Ownership, leasehold, use, or possession of any property, or interest therein, located within the Court's territorial jurisdiction; and

(d) Tortious acts committed within the Court's territorial jurisdiction; or injury effected within the Court's territorial jurisdiction by tortious acts committed elsewhere.

Nothing in this section shall be construed to mean that the Tribe has limited its civil jurisdiction over the activities of non-Indians.

This section shall apply to all pending cases, and to all pre-existing causes of action not otherwise barred.

2 T.M.T.C. § 2.0102(1) (amended 1987).

STATEMENT OF THE CASE

A. Introduction.

This case follows in the wake of this Court's decisions in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers*) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*Iowa Mutual*). In those cases, the Court announced the Indian abstention doctrine. That doctrine requires federal courts to abstain from exercising jurisdiction over challenges to tribal jurisdiction until such challenges have first been raised in and resolved by the appropriate tribal forums. Once tribal remedies have

been exhausted, federal courts may review the tribal decisions to determine whether tribal jurisdiction is proper.

In both *National Farmers* and *Iowa Mutual* tribal remedies were unexhausted. This case thus presents the first federal court review of an exhausted challenge to tribal jurisdiction. Ernest V. Parisien (Parisien) is an enrolled member of the Turtle Mountain Band of Chippewa Indians (the Tribe). Twin City Construction Company of Fargo (Twin City), is a non-Indian general contractor. Twin City spent several years on the Turtle Mountain Chippewa Indian Reservation performing a nearly eight million dollar federal contract to build a tribal school on trust land for attendance primarily by Indian students. During the project, Twin City employed Indian people directly, and by subcontract. Parisien was one of the subcontractors, and he and Twin City became involved in a dispute over the subcontract. To resolve the dispute, Parisien sued Twin City in the Turtle Mountain Tribal Court. Twin City defended on the grounds that the Tribal Court lacks jurisdiction over the action.

The Turtle Mountain Court of Appeals held that the Tribal Court has jurisdiction over the action against Twin City. Reversing the Tribal Court of Appeals, the federal district court held the Tribal Court lacks jurisdiction. A panel majority of the Court of Appeals for the Eighth Circuit reversed the district court and upheld tribal jurisdiction. On rehearing *en banc*, the Eighth Circuit was equally divided, the result of which is an affirmance of the district court's judgment. This petition now seeks review of the *en banc* judgment of the equally divided Eighth Circuit Court of Appeals.

B. Proceedings in the Tribal Courts and in the Federal District Court.

In 1981, Twin City was awarded a nearly eight million dollar contract by the federal Bureau of Indian Affairs to build a tribal high school on the Turtle Mountain Reservation. Twin City hired Parisien under a subcontract, to perform certain water, storm, and sanitary sewer work on the project. In 1982, Twin City became dissatisfied with Parisien's progress. It requested timely performance. Parisien responded that, because of the harsh winter, he could not continue work until the spring, whereupon Twin City "took over" the subcontract.

In 1984, Parisien filed an action in the Turtle Mountain Tribal Courts[1] against Twin City and its surety, United States Fidelity and Guaranty Company, seeking payment for work performed. In May, 1985, the Tribal Court dismissed the action for lack of jurisdiction. (A-49). At that time Title 2 of the Turtle Mountain Tribal Code, Section 2.0102(1) (hereinafter "§ 2.0102" or "Tribal Code"), limited the civil jurisdiction of the Tribal Court over actions involving non-Indians to cases in which the

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[1] The Tribe has a two-tiered court system. The court of original jurisdiction is called the "Tribal Court." The appellate court is called the "Court of Appeals." The Tribal Court and the Tribal Court of Appeals are referred to collectively herein as the "Tribal Courts."

non-Indian submits to jurisdiction.[2] The Tribal Court found that in this case, Twin City had not submitted to jurisdiction within the meaning of § 2.0102.

Parisien appealed and in June, 1986, the Tribal Court of Appeals reversed. (A-47). The Tribal Court of Appeals construed § 2.0102 to encompass implicit as well as explicit submission to Tribal Court jurisdiction, and found that on the facts of the case, Twin City had impliedly submitted to Tribal Court jurisdiction over Parisien's contract action. The Tribal Court of Appeals also held that there were no federal law limits on tribal jurisdiction over the action. The case was remanded for a trial on the merits of the subcontract dispute.

Twin City sought declaratory and injunctive relief in federal district court against further proceedings in the Tribal Courts.[3] Its complaint in district court encompassed both the issue of whether federal law has limited tribal jurisdiction over Parisien's action against Twin City, and the issue of whether tribal law prohibits jurisdiction over the action. In addition to Parisien, Twin City named the Tribe, the Tribal Chairman, the Tribal Council, the Tribal Court, and the Tribal Court Judge as defendants.

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[2] Following the federal district court's judgment in this case, the Tribal Code was amended to clarify that the Tribal Court has jurisdiction over civil actions involving non-Indians except as may be limited by federal law. The amendment expressly applies to all pending actions.

[3] Following the filing of the federal court action, the Tribal Court voluntarily stayed further proceedings in the Tribal Court regarding this case pending a final federal judgment.

The federal magistrate issued her report and recommendation in June, 1987. (A-27). She recommended that tribal jurisdiction be denied as a matter of federal law, under principles announced by this Court in the case of *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*). In August, 1987, the district court dismissed the tribal parties on the grounds of sovereign immunity. It also assumed jurisdiction over Twin City's claims[4] and held that the Tribal Court lacks jurisdiction as a matter of tribal law. Substituting its decision for that of the Tribal Court of Appeals, the district court found that Twin City had not submitted to jurisdiction within the meaning of the Tribal Code. (A-25). The district court did not reach the issue of whether federal law has limited the jurisdiction of the Tribal Court.

C. Proceedings in the Court of Appeals for the Eighth Circuit.

1. The Opinion of the Majority of the Three-Judge Panel.

Parisien appealed, and the Tribe was granted leave to file a brief *amicus curiae* in his support and to participate in oral argument. A three-judge panel of the Court of Appeals for the Eighth Circuit entered its opinion on September 20, 1988. (A-6). The majority opinion was written by Judge Heaney and joined by Senior District Judge Irving Hill of the Central District of California. The majority held that the district court had jurisdiction over

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[4] The district court never stated its basis for jurisdiction. In its complaint, Twin City alleged jurisdiction under 28 U.S.C. § 1331 (1948).

Twin City's claims under 28 U.S.C. § 1331. The majority also reversed the district court and upheld Tribal Court jurisdiction under federal law, and under tribal law, by deferring to the Tribal Court of Appeals' decision on the tribal law issue.

As to the issue of tribal jurisdiction under federal law, the majority noted this Court's pronouncement in *Iowa Mutual*, that tribal court jurisdiction over non-Indians on the reservation is presumed unless affirmatively limited by a specific federal law. The majority also noted that Twin City was not relying on any such law for its argument that tribal jurisdiction had been curtailed. Instead, Twin City was relying largely on *Montana* for the proposition that tribal court jurisdiction over actions by tribal members against non-Indians is presumed to be lacking. The majority rejected Twin City's *Montana* argument on three independent grounds.

First, the majority held that *Montana* involved non-Indian land, whereas "[t]his case does not involve land owned by non-Indians." (A-11).

Second, and alternatively, the majority found that this case presents a prime example of an exercise of tribal jurisdiction specifically permitted under *Montana*. *Montana* expressly held that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565. The majority noted that "[t]he instant case clearly involves a consensual relationship entered by a non-Indian with a member of the Band." (A-12).

Third, and alternatively, the majority relied upon the *Iowa Mutual* test. In *Iowa Mutual*, this Court stated that jurisdiction over non-Indians on the reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." 480 U.S. at 18. Finding that this resolved any ambiguities created by *Montana* regarding tribal court jurisdiction over a reservation-based action by a tribal member against a non-Indian, and finding no limiting treaty provision or federal statute applicable to this case, the majority concluded that the Turtle Mountain Tribal Courts have jurisdiction over Parisien's action against Twin City as a matter of federal law. (A-12 through A-13).

As to the issue of tribal jurisdiction as a matter of tribal law, under the Tribal Code, the majority held that, assuming there is a "clear and proper basis for federal jurisdiction for the case as a whole," federal courts have jurisdiction over claims based upon a tribal statute, but are "bound, in exercising that jurisdiction, to accept and apply the law on the matter as declared by the highest tribal court." (A-14). Here, the majority analogized to a federal court applying state law as a rule of decision when there is an on-point construction of the state law by the highest state court. In such instances, federal courts are bound by the determination of the highest state court.

2. The Dissenting Opinion of the Three-Judge Panel.

Judge McMillian concurred with the majority in part and dissented from them in part. (A-16 through A-21). He concurred in the holding that the district court had jurisdiction over Twin City's claims under 28 U.S.C. § 1331.

He dissented from the holding that the Tribal Courts have jurisdiction. His dissent was based on two independent grounds.

First, Judge McMillian did "not believe that the tribe's jurisdictional statute authorizes the assertion of jurisdiction over Twin City." (A-16). Rather than deferring to the Tribal Court of Appeals' interpretation of the Tribal Code, Judge McMillian, like the federal district court, substituted his judgment and concluded that "Twin City has taken no actions to submit itself to the tribal court's jurisdiction within the meaning of the . . . statute." (A-17).

Second, and alternatively, Judge McMillian concluded that tribal jurisdiction was unauthorized under federal law. (A-17). He first noted that Congress had not delegated authority to the Tribe to exercise jurisdiction in this case. He then determined that the Tribe's inherent authority could not support an exercise of jurisdiction. In his view, tribal jurisdiction was presumed to be lacking, based on principles announced by this Court in *Montana*. Further, Parisien had failed to rebut the presumption against jurisdiction, because he had not shown that he came within either the "consensual relationship" test or the "direct effect" test (the "tribal interest" tests) as set forth in that case. (A-19 through A-21).

3. The Equally Divided *En Banc* Court.

Twin City sought rehearing *en banc* which was granted November 10, 1988. In the Eighth Circuit, the granting of rehearing *en banc* vacates the panel's opinion. (A-5). The Tribe's motion for leave to participate in oral

argument as *amicus curiae* in support of Parisien was granted and rehearing *en banc* was held December 8, 1988.

The *en banc* judgment was entered January 11, 1989. (A-1). The court of ten judges was equally divided. Judges McMillian, Bowman, Wollman, Magill, and Beam voted to affirm the district court, which held that the Tribal Court lacks jurisdiction over Parisien's action against Twin City. Chief Judge Lay and Judges Heaney, Arnold, John R. Gibson, and Fagg voted to reverse. In the Eighth Circuit, the result of an equally divided *en banc* court is an affirmance of the district court's judgment. (A-3).

The judges who voted to reverse the district court filed a special dissent in favor of Parisien and the Tribe. (A-3 through A-4). The dissent, authored by Chief Judge Lay, opined that the affirmance of the district court's judgment is contrary to decisions of this Court, namely *Iowa Mutual*, governing the determination of questions of tribal court jurisdiction over reservation-based civil actions involving non-Indians.

REASONS FOR GRANTING THE WRIT

The equally divided *en banc* Eighth Circuit court affirmed the "judgment of the district court." This Court has granted *certiorari* in cases of equally divided *en banc* courts. *See Hill v. Lockhart*, 474 U.S. 52, 53 (1985) ("we granted certiorari because of the difference between the result reached in the present case and that reached by the Court of Appeals for the Fourth Circuit. . . ."); *Fair*

Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 102 (1981) ("we granted certiorari to resolve a conflict among the Courts of Appeals . . . .").

The district court's judgment in this case is that the Tribal Court lacks jurisdiction over Parisien's action against Twin City. There are two possible grounds for the judgment: that jurisdiction is lacking under federal law, and that jurisdiction is lacking under tribal law. The *en banc* dissent implies that the *en banc* court was divided over the federal law issue. Nevertheless, it is unclear on what grounds the *en banc* court affirmed the district court's judgment, and Parisien therefore addresses both the federal law issue and the tribal law issue in this petition.

I. THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO RECONCILE THE PRINCIPLES SET FORTH IN *MONTANA* WITH THOSE SET FORTH IN CASES INVOLVING TRIBAL COURT JURISDICTION OVER CIVIL ACTIONS INVOLVING NON-INDIANS, INCLUDING *WILLIAMS V. LEE* AND *IOWA MUTUAL*; AND TO RESOLVE THE CONFLICT BETWEEN THE RESULT OF JUDGMENTS IN THE EIGHTH AND NINTH CIRCUITS.

A. The Result Below Is Contrary To Decisions Of This Court.

This case involves the civil jurisdiction of a tribal court over a reservation-based action involving a non-Indian and a tribal member, and therefore is governed by the line of cases in which tribal jurisdiction in such cases is presumed. Such has been the rule ever since this Court decided *Williams v. Lee*, 358 U.S. 217 (1959). Yet much of

the proceedings in this case have focused on the application of *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), a case in which the Court alluded to instances in which tribal jurisdiction is presumed to be lacking. This petition presents the opportunity for the Court to give guidance to the lower courts in the application of its cases in this important area of tribal jurisdiction.

In *Williams v. Lee*, a non-Indian tried to sue a tribal member in state court to collect on a debt incurred on the reservation. This Court held that exclusive jurisdiction to resolve such disputes is in the tribal courts. Specifically, the Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . .The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . .If this power is to be taken away from them, it is for Congress to do it.

Williams v. Lee, 358 U.S. at 223 (citations omitted). The rule of *Williams v. Lee*, presuming tribal jurisdiction, governs this case since they are virtually indistinguishable. Both involve a private dispute arising wholly on the reservation, between a non-Indian and a tribal member.

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (*National Farmers*), a tribal member was injured on the reservation by a non-Indian. The non-Indian, faced with a lawsuit against it in tribal court, argued that this Court should extend the rule of *Oliphant*

v. Suquamish Indian Tribe, 435 U.S. 191 (1978) to the area of civil adjudicatory jurisdiction. *National Farmers*, 471 U.S. at 853-855. *Oliphant* held that, by virtue of their "dependent" sovereign status, tribes may not exercise criminal jurisdiction over non-Indians. This Court rejected that argument, and held that tribal civil adjudicatory jurisdiction has not been generally divested or implicitly limited by federal law. *National Farmers*, 471 U.S. at 855-856. Thus, the Court reaffirmed that tribal court jurisdiction in civil cases, such as this one, is presumed.

Most recently, in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*Iowa Mutual*), another case involving tribal court jurisdiction where a tribal member had been injured on the reservation, this Court stated unequivocally:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. . . .Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact."

Iowa Mutual, 480 U.S. at 18 (citations omitted).

Plainly, the result below is contrary to this entire line of authority on tribal court civil jurisdiction. As the dissenting opinion of the *en banc* court states, the affirmance of the district court's judgment that the Tribe lacks jurisdiction "disregards the instruction of the Supreme Court of the United States." Cases such as *Montana*, to the extent they apply a rebuttable presumption against tribal jurisdiction, simply do not apply here. Since this issue

has been heard *en banc* by the Eighth Circuit, and disposed of by default because of an equally split court, it is likely that only this Court can now ensure that its decisions on this critical jurisdictional issue are properly applied in that Circuit.[5]

B. The Result Below Is Contrary To A Decision Of The Ninth Circuit.

In a case very similar to this one, *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), the Ninth Circuit has upheld tribal jurisdiction. In *Sanders v. Robinson*, a tribal member sued a non-Indian in tribal court for divorce and custody of their children. Both parties had resided on the reservation during their marriage. The tribal appellate court upheld tribal court jurisdiction over the action. The non-Indian then challenged the tribal court's jurisdiction in federal district court. 864 F.2d at 631.

The district court held that tribal court jurisdiction was proper. The Ninth Circuit affirmed. 864 F.2d at 634. In analyzing tribal jurisdiction, the Ninth Circuit quoted the *Iowa Mutual* test, that tribal court jurisdiction over reservation-based actions against non-Indians is presumed unless specifically divested by federal law. *Id.* at 632-633. The clear implication is that the Ninth Circuit applied the test and found no applicable limiting treaty provision or federal statute.

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[5] If the Court accepts this case, Parisien intends to argue in the alternative that, assuming *arguendo* tribal jurisdiction is presumed to be lacking, he has successfully rebutted that presumption in this case.

The result in this case is contrary to *Sanders v. Robinson*. As in that case, no specific federal law limits tribal jurisdiction here. Indeed, Twin City has never relied upon or made a showing of any such specific limitation to overcome the presumption of tribal jurisdiction. The Tribal Court of Appeals found nothing expressly divesting inherent tribal authority in this case. The majority of the Eighth Circuit panel found no applicable limiting treaty provision or federal statute. The dissenting opinion of the panel was silent on this point. This Court should take this opportunity to resolve the conflict between different results reached in the Eighth and Ninth Circuits.

II. THIS COURT SHOULD IN THIS CASE ESTABLISH A RULE OF DEFERENCE TO TRIBAL COURT DECISIONS ON TRIBAL LAW CONSISTENT WITH THE FEDERAL POLICY OF ENCOURAGING TRIBAL SELF-GOVERNMENT, AND RESOLVE A CONFLICT BETWEEN THE RESULT OF JUDGMENTS IN THE EIGHTH AND NINTH CIRCUITS AS TO SUCH A RULE.

In this case, the Turtle Mountain Court of Appeals, the highest court in the Tribe's judicial system, construed a provision of the Tribal Code. The federal district court substituted its interpretation of the provision for that of the Tribal Court of Appeals. This is a stark invasion of tribal sovereignty, and completely contrary to the federal policy of encouraging tribal self-government. As this Court has recognized, "Congress, aware of the intrusive effect of federal judicial review upon tribal self-

government," has consistently refrained from such interference with tribal autonomy. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 70 (1978).

The panel majority saw the federal district court's error, and reversed it on this issue. The majority stated that, on such issues of purely tribal law, federal courts must accept the law as declared by the highest tribal court. The majority analogized to cases in which federal courts apply state law as a rule of decision. In such cases, an on-point construction of state law by the highest state court is binding on the federal court. *See, e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 826 (8th Cir. 1983).

Significantly, the district court cited no authority for its substitution. And, absent misapprehensions of federal law by the highest tribal court, there are no grounds for such a substitution. That is the rule regarding high state court decisions on state law issues, and it is the only rule consistent with the federal policy of encouraging tribal self-government. This Court should take this opportunity to establish a standard of review, consistent with modern federal Indian policy, which the lower federal courts must follow when reviewing tribal decisions. Undoubtedly, as litigants proceed under the federal court review doctrine established by *National Farmers* and *Iowa Mutual*, this is, and will continue to be, an important and recurring issue throughout Indian country.

Moreover, the result below is contrary to a recent decision of the Ninth Circuit, *Sanders v. Robinson*, that when the highest tribal court resolves an issue of purely

tribal law, the federal courts are bound by that determination. 864 F.2d at 633. In challenging tribal court jurisdiction over the action against him, the non-Indian in *Sanders v. Robinson* raised an issue of purely tribal law: whether the tribal constitution prohibited jurisdiction. The tribal appellate court held that jurisdiction was permitted under the constitution. The Ninth Circuit held "[t]hat court's interpretation of tribal law is binding on this court." *Id.* at 633. *Sanders v. Robinson* and the result below are in conflict on this important issue, a conflict requiring resolution by this Court.

III. ASSUMING *ARGUENDO* THAT FEDERAL COURTS MAY SUBSTITUTE THEIR JUDGMENT FOR THAT OF TRIBAL COURTS ON TRIBAL LAW ISSUES, THE DECISION BELOW IS IN ERROR BECAUSE THERE ARE NO TRIBAL LAW LIMITS ON JURISDICTION.

Tribal jurisdiction in this case is permitted under the original Tribal Code because it encompasses implied submission, and because Twin City impliedly submitted to jurisdiction. Alternatively, the amended Tribal Code applies to this action and clarifies that there are no tribal law limits on tribal jurisdiction. Under either provision, the affirmance of the district court's judgment that the Tribe lacks jurisdiction is in error.

A. Jurisdiction Is Permitted Under The Original Tribal Code.

The original Tribal Code provided that the Tribal Court had jurisdiction over civil actions involving non-

Indians when the non-Indian "submitted" to jurisdiction. Tribal Code, § 2.0102 (1976). In interpreting this provision in this case, the Tribal Court of Appeals recognized that Twin City had not expressly submitted to jurisdiction. The Tribal Court of Appeals, however, determined that the provision was intended to encompass implicit, as well as explicit submission.

The federal district court held that "submission" meant express submission only. Oddly, in so construing the Tribal Code, the district court relied on cases dealing with tribal sovereign immunity, *e.g., American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe,* 780 F.2d 1374 (8th Cir. 1985). This reliance is misplaced. The rule requiring an express waiver of tribal immunity simply does not apply to the issue of the amenability of a non-Indian individual to tribal court civil jurisdiction where the action is reservation-based and involves a tribal member.

The panel majority recognized this error and noted, "[n]o party cites a case for the proposition that a non-Indian (non-governmental) entity must expressly submit to the subject matter jurisdiction of a tribal court before jurisdiction can be assumed." (A-13 through A-14 at n.6). Even the panel dissent did not take issue with the Tribal Court of Appeals' construction of the statute as including implied submission.

In addition, Twin City did impliedly submit to jurisdiction in this case. It is well-established in American common law that doing business within a territory constitutes implied submission to personal jurisdiction. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310, 316

(1945). And, outside the area of Indian law, in actions based on a construction contract, a contractor is generally subject to jurisdiction in the forum in which the construction project takes place. *See, e.g., Vespe Contracting Co. v. Anvan Corp.*, 433 F.Supp. 1226, 1234-1235 (E.D. Pa. 1977); *Mid-America, Inc. v. Shamaiengar*, 714 F.2d 61, 61-62 (8th Cir. 1983).

Twin City's dispute with Parisien arose wholly on the Turtle Mountain Reservation. For years Twin City did extensive work on the Reservation performing a federal contract involving millions of dollars and the employment of many Indian people. It involved the construction of a tribal school intended to serve primarily Indian students. It involved a subcontract entered into between a non-Indian and a tribal member. Based on these facts, the Tribal Court of Appeals correctly concluded that Twin City submitted to Tribal Court jurisdiction, and the result below is in error. This Court should grant review to correct the erroneous result.

B. Alternatively, The Amended Code Applies And Clarifies That There Are No Limits On Tribal Jurisdiction.

After the federal district court's judgment in this case, the Turtle Mountain Tribal Council, the legislative body of the Tribe, amended Tribal Code § 2.0102 to clarify that the Tribal Court has jurisdiction over actions such as this one. As amended, § 2.0102 now provides for Tribal Court jurisdiction over civil actions involving non-Indians "to the extent permitted by . . . the laws of the United States." Tribal Code, § 2.0102 (amended 1987). The

amended provision expressly states that it applies to all pending actions. *Id.*

Since the amendment makes clear that under tribal law, the Tribal Court has jurisdiction, the issue of tribal law limits is moot. *See Dimond v. District of Columbia*, 792 F.2d 179, 185 (D.C. Cir. 1986); *Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861, 865 (8th Cir. 1977). The amendment governs this appeal because an appellate court must apply the law in effect at the time it renders its decision. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 281 (1969). Accordingly, this Court should grant review to vacate the judgment below which affirmed the district court's judgment that the Tribe lacks jurisdiction.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* to review the *en banc* judgment of the equally divided Eighth Circuit Court of Appeals.

Respectfully submitted,

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March 1989

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TWIN CITY CONSTRUCTION CO. OF FARGO and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellees,

v.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS through its Chairman, Richard LaFromboise; The Tribal Council of the Turtle Mountain Band of Chippewa Indians, through its chairman, Richard LaFromboise; the Turtle Mountain Tribal Court, Beverly May in her official capacity of Judge of the Turtle Mountain Tribal Court; and

ERNEST V. PARISIEN, d/b/a PARISIEN EXCAVATION,

Appellant.

No. 87-5413

DC Civil No. A2-86-124

JUDGMENT

Entered January 11, 1989

Appeal from the United States District Court for the District of North Dakota

Honorable Patrick A. Conmy, Chief Judge, Presiding

Argued and Submitted May 13, 1988 – St. Paul, Minnesota. Decided September 20, 1988.

Petition for Rehearing *En Banc* Granted November 10, 1988

Reargued and resubmitted *En Banc* December 8, 1988 – St. Louis, Missouri.

Before LAY, Chief Judge, HEANEY, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges, *en banc*.

McMILLIAN, Circuit Judge.

Twin City Construction Co. (Twin City) entered into a contract with the Bureau of Indian Affairs to construct a school on the Turtle Mountain Reservation in North Dakota. Twin City was a non-Indian contractor. Under a subcontract, Twin City hired Ernest V. Parisien, d/b/a Parisien Excavation, to perform water, storm and sanitary sewer work. Parisien belonged to the Turtle Mountain Band of Chippewa Indians.

In 1982 Twin City became dissatisfied with Parisien's progress. It requested timely performance. Parisien responded that, because of the harsh winter, he could not continue work until the spring, whereupon Twin City "took over" the subcontract.

Parisien brought suit in tribal court for the payment for work already performed against Twin City and its surety, United States Fidelity & Guaranty Co. The Turtle Mountain Tribal Court dismissed the case for want of jurisdiction. The Turtle Mountain Court of Appeals reversed. Twin City then sought declaratory and injunctive relief in federal district court against further proceedings in the Turtle Mountain Tribal Courts. The district court[1] granted the injunction, holding that the Turtle

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[1] The Honorable Patrick A. Conmy, Chief Judge, United States District Court for the District of North Dakota.

Mountain Tribal Courts did not have subject matter jurisdiction. *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians*, Civil No. A2-86-124 (D.N.D. Aug. 24, 1987). Parisien appealed.

A divided panel reversed the judgment of the district court. Appellees' petition for rehearing en banc was granted, vacating the panel opinion. The case was heard by the court en banc on December 8, 1988.

The judgment of the district court is affirmed by the vote of an equally divided court. Judges McMillian, Bowman, Wollman, Magill, and Beam voted to affirm the judgment of the district court; Chief Judge Lay and Judges Heaney, Arnold, John R. Gibson, and Fagg voted to reverse.

LAY, Chief Judge, with whom HEANEY, ARNOLD, JOHN R. GIBSON AND FAGG, Circuit Judges, join, dissenting specially.

I respectfully submit that the affirmance of the district court which divests the Turtle Mountain Tribal Court of jurisdiction is in error. In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the Supreme Court of the United States stated:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. * * * Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." * * * In the absence of any

> indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Id. at 18 (citations omitted). The result reached by the five-to-five affirmance disregards the instruction of the Supreme Court of the United States.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TWIN CITY CONSTRUCTION CO. OF FARGO, et al.

Appellees,

v.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, etc.
et al.

Appellants.

No. 87-5413

DC Civil No. A2-86-124

ORDER

Entered
November 10, 1988

Appeal from the United States District Court
for the District of North Dakota

Honorable Patrick A. Conmy, Chief Judge, Presiding

Argued and Submitted May 13, 1988. Decided September 20, 1988.

Appellees' Petition for Rehearing en banc has been considered by the Court and is hereby granted. The opinion of this Court which was issued on September 20, 1988, is vacated. The case is set for oral argument before the Court en banc at 9:00 A.M. on Thursday, December 8, 1988, in the U.S. Court and Customhouse in St. Louis, Missouri.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TWIN CITY CONSTRUCTION CO. OF FARGO and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Appellees,

v.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS through its Chairman, Richard LaFromboise; The Tribal Council of the Turtle Mountain Band of Chippewa Indians, through its chairman, Richard LaFromboise; the Turtle Mountain Tribal Court, Beverly May in her official capacity of Judge of the Turtle Mountain Tribal Court; and

ERNEST V. PARISIEN, d/b/a PARISIEN EXCAVATION,

Appellant.

No. 87-5413

DC Civil No. A2-86-124

OPINION

Entered September 20, 1988

[Vacated November 10, 1988]

Appeal from the United States District Court
for the District of North Dakota

Honorable Patrick A. Conmy, Chief Judge, Presiding

Argued and Submitted May 13, 1988.

Before HEANEY and McMILLIAN, Circuit Judges, and HILL,* Senior District Judge.

HEANEY, Circuit Judge.

Twin City Construction Company of Fargo, North Dakota, entered into a contract with the Bureau of Indian Affairs to construct a school on the Turtle Mountain Reservation in North Dakota. Twin City was a non-Indian contractor. Under a subcontract, Twin City hired Ernest Parisien, d/b/a Parisien Excavation to perform water, storm and sanitary sewer work. Parisien belonged to the Turtle Mountain Band of Chippewa Indians.

In 1982, Twin City became dissatisfied with Parisien's progress. It requested timely performance. Parisien responded that, because of the harsh winter, he could not continue work until the spring, whereupon Twin City "took over" the subcontract.

Parisien brought a suit in tribal court for the payment for work already performed against Twin City and its surety, United States Fidelity and Guaranty Co. (hereinafter jointly referred to as Twin City). The Tribal Court dismissed the case for want of jurisdiction. The Turtle Mountain Court of Appeals reversed. Twin City sought declaratory and injunctive relief in federal district court against further proceedings in the Turtle Mountain Tribal Courts. The district court granted the injunction, holding that the Tribal Courts did not have subject matter jurisdiction. Parisien appeals. We reverse.

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*The Honorable Irving Hill, United States Senior District Judge for the Central District of California, sitting by designation.

A. Federal Question and Exhaustion

Initially, we examine whether the district court had jurisdiction to hear Twin City's motion for declaratory and injunctive relief. Twin City claims jurisdiction under 28 U.S.C. § 1331. Under that section, Twin City must establish that this claim arises under federal law. In *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), the Supreme Court considered a case in which a tribal court entered a default judgment against a non-Indian insurance company. The insurance company then brought an action in federal district court and the court enjoined further proceedings in the tribal courts. The Supreme Court found the question of whether the injunction was proper to be a federal question. *Id.* at 852-53.

The district court was presented with a similar question here, whether "federal law has curtailed the powers" of the Band, *see id.* at 852, or specifically, whether federal law has limited the jurisdiction of the Turtle Mountain Tribal Courts such that they cannot assert civil jurisdiction over a non-Indian who has entered a contract with a member of the Turtle Mountain Band. While *National Farmers* concerned a personal injury action, it "establishes no distinctions between personal injury actions and other civil matters arising within the territory governed by the tribe." *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1415 (9th Cir.) *cert. denied*, 476 U.S. 1117 (1986). We hold therefore that the district court had subject matter jurisdiction under section 1331 to determine whether federal law restricted the exercise of the Turtle

Mountain Tribal Courts' jurisdiction over the dispute between Parisien and Twin City.[1]

B. Limitation by Federal Law

We turn now to the federal question identified in *National Farmers*, whether federal law "curtails" the exercise of civil jurisdiction by the Turtle Mountain Tribal Courts over the instant dispute.[2] Congress has plenary authority over Indian tribes. *See, e.g., National Farmers*, 471 U.S. at 851. The tribes, however, "retain 'attributes of sovereignty over both their members and their territory' * * * to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 94 L.Ed.2d 10, 18 (1987) (citation

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[1] *National Farmers* also requires a party, as a matter of comity, to exhaust tribal court remedies before seeking to enjoin tribal court proceedings in federal court. 471 U.S. at 856. The Court required exhaustion because Congress was "committed to a policy of supporting tribal self-government and self-determination," and tribal courts should therefore be given the first opportunity to consider the challenge. Moreover, the development of a full record in the tribal courts furthered the orderly administration of justice. And, finally, exhaustion of tribal court remedies permitted tribal courts to bring their expertise to bear on such matters. *Id.* at 856-57.

This matter was heard by the highest court in the Turtle Mountain Tribal Court system. Twin City has therefore exhausted its tribal court remedies.

[2] The criminal jurisdiction of a tribal court over non-Indians is another matter. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding tribal courts did not have criminal jurisdiction over non-Indians).

omitted). Determining the "extent of a tribal court's jurisdiction * * * require[s] a careful examination of tribal sovereignty, the extent to which the sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers*, 471 U.S. at 856-57. Civil jurisdiction over activities of non-Indians on the reservation, however, "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual*, 480 U.S. 9, 94 L.Ed.2d at 21.

The parties cite to no treaty or federal statute, and we have found none,[3] which limits the civil jurisdiction of

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[3] The Turtle Mountain Band of Chippewa Indians is organized under a constitution approved by the United States Secretary of the Interior on June 16, 1959, pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. § 476. The reservation was established by Executive Orders of December 21, 1882, March 29, 1884, and June 3, 1884, and an agreement adopted by Congress in the Act of April 21, 1904, ch. 1402, 33 Stat. 189, which was approved by the Band on February 15, 1905. *See Turtle Mountain Band of Chippewa Indians v. United States*, 203 Ct. Cl. 426, 490 F.2d 935, 941 (1974).

The case law does not suggest that Congress has in any way diminished the Band's authority over the reservation. *See, e.g., Davis v. Muellar*, 643 F.2d 521, 533 (8th Cir.) *cert. denied* 454 U.S. 892 (1981) (McMillian, dissenting) (recognizing Turtle Mountain Band's inherent sovereignty to establish court system); *id.* at 527 (majority opinion) (accepting dissent's

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the Turtle Mountain Tribal Courts over non-Indians who enter contracts with members of the Band where the transaction involves government or tribal property. Twin City relies on *Montana v. United States*, 450 U.S. 544 (1981). *Montana* involved regulation of the hunting and fishing by non-Indians who owned fee patents, formerly owned by Crow Tribe members, on the reservation. The Supreme Court held the Tribe could not regulate such activities.

Montana does not control here. First, it involved allotments which non-Indians had purchased and the attempted control by the Tribe of hunting and fishing on those allotments. The Court's holding relies on a distinction between the control by a tribe of land on the reservation owned by non-Indians and control of that owned by the tribe or tribal members. *See, e.g., id.* at 559-60 n.9 ("It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."). This case does not involve land owned by non-Indians.

Second, even in the case of an allotment owned by a non-Indian, the Court states that "[a] tribe may regulate, through taxation, licensing, *or other means*, the activities of nonmembers who enter *consensual relationships with* the tribe *or its members through commercial dealings, contracts,*

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characterization of the Turtle Mountain Band's attributes of sovereignty).

leases or other arrangements." *Id.* at 565 (emphasis added).[4]

The instant case clearly involves a consensual relationship entered by a non-Indian with a member of the Band. Thus, even if we ignored the distinction in *Montana* between land owned by non-Indians and land owned by the tribe or tribal members, the Turtle Mountain Tribal Courts would have the authority to regulate this consensual relationship entered by a non-Indian and an Indian.

Finally, to the extent that *Montana* creates ambiguity in the issue of tribal control over the activities of non-Indians on tribal lands, *Iowa Mutual* removes it. That case made clear that jurisdiction over the activities of non-Indians on the Reservation "presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual,* 480 U.S. 9, 94 L.Ed.2d at 21.[5] Finding no such treaty provision or

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[4] A tribe also retains "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

[5] To reconcile any differences in the holdings of *Montana* and *Iowa Mutual,* it could be said that the presumption of civil jurisdiction was overcome in *Montana* by the effect of the Allotment Acts (the General Allotment Act of 1887, 25 U.S.C. §§ 331-372 (originally enacted as Act of Feb. 8, 1887, ch. 119, 24 Stat. 388) and the Crow Allotment Act of June 4, 1920, ch. 224, 41 Stat. 751); the sales of the fees to non-Indians; the fact that the non-Indians had not entered consensual relations with the tribe or its members in anything related to the attempted

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federal statute, we conclude that federal law does not limit the civil jurisdiction of the Turtle Mountain Tribal Courts under the Turtle Mountain Tribal Code over Twin City.

C. Jurisdiction to Interpret the Tribal Ordinance

The district court did not address the limitations federal law places on tribal court jurisdiction. It decided that such analysis was unnecessary, and held that the Band's jurisdictional statute did not permit the Turtle Mountain Tribal Courts to exercise subject matter jurisdiction over the dispute between Twin City and Parisien.

The jurisdictional provision in force at the time Parisien's action was commenced provided that the "Tribal Court shall have civil jurisdiction over non-Indians in any particular case where they submit themselves to the jurisdiction of the Court * * *." Turtle Mountain Tribal Code of 1976, § 2.0102(1). The district court held that "submission" under the statute must be express and found that Twin City had not expressly submitted.[6]

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hunting and fishing regulation; and the fact that a finding of no regulatory authority did not threaten or directly affect "the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66.

[6] The district court cited *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), in support of the express waiver rule. However, that case involved the waiver of sovereign immunity by an Indian Tribe. This case involves waiver by a private party. No party

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The Turtle Mountain Court of Appeals viewed the matter differently. It considered two possible definitions of "submission:" (1) a narrow definition under which a party can negate jurisdiction by objecting to it; and (2) a broader definition drawn from "the extensive case law interpreting both civil jurisdiction and tribal sovereignty." After discussing this case law, the Turtle Mountain Court of Appeals decided that the statute adopted the broader definition, and held that the dispute between Parisien and Twin City could be heard by the Tribal Courts.

We hold that the district court did have jurisdiction[7] to construe the tribe's jurisdictional statute, but was bound, in exercising such jurisdiction, to accept and apply the law on the matter as declared by the highest tribal court.[8] The situation is analogous to a case in which

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cites a case for the proposition that a non-Indian (non-governmental) entity must expressly submit to the subject matter jurisdiction of a tribal court before juridiction can be assumed.

[7] A district court's pendent jurisdiction is not contingent upon first adjudicating the merits of the federal question. Nor does pendent jurisdiction retroactively cease to exist when a circuit court holds that a defendant must prevail on the merits of the federal grounds being asserted in the action.

[8] One twist in this case is that about a month after the federal district court entered its order, the Turtle Mountain Band amended its Tribal Code. As amended, the Code gives the Tribal Courts subject matter jurisdiction "to the extent permitted by the Tribal Constitution and by the laws of the United States." Turtle Mountain Tribal Code of 1976, § 2.0102 (as amended 1987).

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the federal court is applying state law as the rule of decision on some aspect of the case, where there is also a clear and proper basis for federal jurisdiction for the case as a whole. In such instances, an on-point construction of state law by the highest state court is binding on the federal court. *See e.g., Hortonville Joint School District No. 1 v. Hortonville Education Association,* 426 U.S. 482, 488, 96 S. Ct. 2308, 2312 (1976); *R. W. Murray Co. v. Shatterproof Glass Corp.,* 697 F.2d 818, 826 (8th Cir. 1983).[9]

In the instant case, the district court erred in refusing to accept the decision of the highest tribal court as to the scope of the tribe's jurisdictional statute, which is purely

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The Amicus brief in this case argues that, assuming the district court had jurisdiction, the original appeal is moot and the new jurisdictional statute should be applied because an appeals court must apply the law in effect at the time it renders its decision. *See Seniors United for Action v. Ray,* 675 F.2d 186, 189 (8th Cir. 1982). Twin City argues that laws should be retroactively applied only if they do not result in manifest injustice. It claims that such an injustice would occur here.

In light of our holding that the district court has jurisdiction to interpret the Turtle Mountain Band's jurisdictional statute but must accept and apply the law as declared by the highest federal [sic] court, we cannot reject the ruling of the tribal court.

[9] Even in a diversity case, if a tribal court has jurisdiction, a federal court with concurrent jurisdiction must require exhaustion of tribal remedies. Moreover, "proper deference to the tribal court system precludes relitigation of issues * * * resolved in the Tribal Courts." *Iowa Mutual,* 480 U.S. 9, 94 L.Ed.2d at 22. Thus, a federal court will generally only consider the merits of a diversity case if a tribal court does not have jurisdiction.

a matter of tribal law. We therefore reverse the district court's judgment and direct that judgment be entered for the defendants.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I respectfully concur in part and dissent in part. I concur in that part of the majority opinion that holds that the district court had subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether federal law restricted the exercise of the Turtle Mountain Tribal Court's jurisdiction over the dispute between Parisien and Twin City. Nevertheless, I dissent from that portion of the majority's opinion which, in my view, permits the tribal court to exercise authority beyond its proper jurisdiction.

First, I do not believe that the tribe's jurisdictional statute authorizes the assertion of jurisdiction over Twin City. The Turtle Mountain Tribal Code provides in part:

> The Tribal Court shall have jurisdiction over all civil matters where all parties are Indians within the jurisdiction of the Court. *The Tribal Court shall have civil jurisdiction over non-Indians in any particular case where they* submit themselves to the jurisdiction of the Court by instituting an action against an Indian and by filing cash bond in the amount of the damages asked or by *submitting him [or herself] to the Court's jurisdiction.*

Turtle Mountain Tribal Code of 1976, § 2.0102(1) (emphasis added).

The jurisdictional statute is restricted in that it only provides for jurisdiction over non-Indians[1] who have submitted to the jurisdiction of the tribal court. The statute is unlike one which extends jurisdiction over non-Indians based merely on their presence on the reservation, entering into a contract with any Indian on the reservation, or committing a tort on the reservation. *See Swift Transportation, Inc. v. John*, 546 F. Supp. 1185, 1188 (D. Ariz. 1982) (*Swift Transportation*), *vacated as moot*, 574 F. Supp. 710 (1983) (order). The tribe's limited jurisdictional statute thus does not allow the assertion of jurisdiction over Twin City merely because it entered into a contract with a tribal member. Twin City has taken no actions to submit itself to the tribal court's jurisdiction within the meaning of the tribe's jurisdictional statute. Thus, I would hold that the tribal court transgressed its own jurisdictional authorization in asserting jurisdiction over Twin City.

Even assuming that jurisdiction over Twin City is authorized by the tribal code, however, I would hold that such jurisdiction is beyond the tribe's authority over non-Indians.[2] The scope of a tribal court's jurisdiction over

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[1] Because this case concerns the assertion of jurisdiction over a non-Indian, I do not address the possible application of this statute to Indians who are not members of the tribe. My use of the term "non-Indian" should not be understood as necessarily having a different meaning from the term non-member. *Cf. Duro v. Reina*, 821 F.2d 1358 (9th Cir. 1987).

[2] Although the district court found it unnecessary to reach this question, we may affirm on any grounds supported by the record. *Johnson v. First Nat'l Bank of Montevideo, Minnesota*, 719

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non-Indians has not always been clearly defined. *Superior Oil Co. v. United States*, 798 F.2d. 1324, 1329 (10th Cir. 1986). The jurisdictional power of a tribal court over non-Indians must be derived from either inherent tribal sovereignty or congressionally delegated authority. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). A tribe may not legislate to extend its civil jurisdiction beyond that retained through tribal sovereignty or permitted by congressional delegation. *Swift Transportation*, 546 F. Supp. at 1193-94. There is no congressional delegation of authority to the tribe to extend jurisdiction over Twin City; accordingly, the tribal court's only authority for the assertion of jurisdiction must stem from the tribe's inherent sovereignty.

The Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana*), addressed the extent to which the inherent sovereign powers of a tribe extend to the assertion of jurisdiction over the activities of non-members of the tribe. In *Montana*, the tribe argued that it had jurisdiction to regulate hunting and fishing by non-members on land within the reservation but owned by non-members. 450 U.S. at 547. The Court disagreed, noting that although tribes have the inherent power to punish tribal offenders, determine tribal membership, regulate domestic relations among tribal members, and

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F.2d 270, 275 (8th Cir.) (appellate court may affirm judgment on grounds other than those relied upon by the district court), *cert. denied*, 465 U.S. 1012 (1984); *Brown v. St. Louis Police Department*, 691 F.2d 393, 396 (8th Cir. 1982) (appellate court may affirm on any grounds supported by record), *cert. denied*, 461 U.S. 908 (1983).

prescribe rules of inheritance for tribal members, the tribe's sovereignty had been divested in areas involving relations between a tribe and non-members of the tribe. *Id.* at 564 (citing *United States v. Wheeler,* 435 U.S. 313, 326 (1978)). The Court thus held that any exercise of tribal power beyond that necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of Indian tribes. *Id.*

The *Montana* court recognized only two narrow exceptions to the general rule prohibiting the assertion of tribal jurisdiction over non-Indians. First, a tribe may regulate the activities of non-Indians who enter into consensual relationships with the tribe or its members. *Id.* at 565. Second, a tribe may exercise civil authority over the conduct of non-Indians if the conduct "has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. The regulation exception does not apply in this matter because the Turtle Mountain Court of Appeals did not conclude that jurisdiction was proper as an extension of the licensing requirement of Twin City.

The Turtle Mountain Court of Appeals did conclude, however, that the second exception permitted the assertion of jurisdiction in this matter. In my opinion, the tribal appellate court erroneously relied on this exception because Twin City's acts did not in any way directly affect the political integrity, the economic security, or the health or welfare of the tribe. Under the second exception outlined in *Montana,* the focus must be on the interests of the *tribe,* rather than the interests of the *individual members* of the tribe. *Swift Transportation,* 546 F. Supp. at 1193. Rather than showing that individual members of the tribe could be affected by the particular conduct of a non-Indian, the tribe must show that the tribe is affected as a

tribe by the conduct of the non-Indian defendant. For example, in *American Indian Agricultural Credit Consortium, Inc. v. Fredericks*, 551 F. Supp. 1020 (D. Colo. 1982), the district court held that it could properly assert subject matter jurisdiction in a dispute over a transaction between a non-member corporation and an individual tribal member. The district court held that if the non-member's conduct could not have caused any interference with tribal self-government or internal tribal affairs, subject matter jurisdiction in the tribal court was improper. *Id.* at 1022.

A similar conclusion was reached in *Swift Transportation*, where the tribal court attempted to assert jurisdiction over a non-Indian involved in an automobile accident with a tribal member on a highway within the reservation boundaries. 546 F. Supp. at 1187-88. The district court, in an action to enjoin the tribal court proceedings, found that there was no direct effect on the tribe, although individual members of the tribe may have been affected. *Id.* The district court noted that its holding was consistent with the general proposition of *Montana* that tribal powers do not extend to a non-member whose actions have not had a direct effect on the tribe. *Id.*

There is no reason to doubt the validity of the *Montana* test. The Court in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 n.12 (1985), cited by the majority, recognized *Montana* as a case in which the Court had been required to decide whether the tribe had retained the power to regulate the affairs of non-Indians. Similarly, in *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S. Ct. 971, 978 (1987), the Court implicitly affirmed the validity of the *Montana* analysis when it cited *Montana* for the proposition that tribal authority over non-Indians is an important part of tribal

sovereignty. The Court did not have the occasion to apply the *Montana* test in either case because it ruled in each case that the tribal court remedies first had to be exhausted.

Thus, once a litigant has exhausted tribal court remedies, the appropriate test to apply is established by *Montana*. *See Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987). Here, the dispute between Twin City and Parisien is merely a contract dispute on a federal construction project. It has not been demonstrated that the tribe itself has been adversely affected by this contract dispute between a tribal member and a non-Indian. Although the tribal appellate court apparently decided that an injury to a single member adversely affected the entire tribe because it could happen to others, this in and of itself is not a showing of a tribal injury. Because no direct effect on the tribe has been shown, there is no basis to find that the tribal court has the authority to exercise jurisdiction over Twin City. Even if Twin City were subject to the jurisdiction of the tribal court under the tribe's limited jurisdictional statute, the tribal court's exercise of jurisdiction in this matter exceeded its authority. Because Parisien has failed to show that Twin City's acts directly affected the political integrity, the economic security, or the health or welfare of the tribe, I would affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

TWIN CITY CONSTRUCTION CO. OF FARGO and UNITED STATES FIDELITY AND GUARANTY CO.,

Plaintiffs,

v.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, *et al.*,

Defendants.

Civil No. A2-86-124

MEMORANDUM AND ORDER

Entered August 24, 1987

A subcontractor sued a prime contractor in a dispute over performance adequacy and payment. The prime contract was entered into between the prime contractor and the United States government, for the construction of a school located on an Indian reservation. Named as defendants were the prime contractor and the Insurance Company which had issued the performance bond required by the United States government.

The subcontractor, Ernest V. Parisien, sued the case out in the Turtle Mountain Chippewa tribal court. The tribal court granted the defendants' motion to dismiss, finding that the court did not have jurisdiction over the defendants. The judgment of dismissal was appealed to the Turtle Mountain Chippewa Court of Appeals, and on June 6, 1986, in a memorandum opinion, the appellate court stated:

ISSUE

> Whether an *Indian Plaintiff* has civil jurisdiction over a non-Indian Defendant when the cause of action arises from a contract performed totally within the external boundaries of the reservation.

Record of Tribal Judiciary Proceedings 291 (emphasis added).

The court then proceeded to cite the tribal law defining the jurisdiction of the court, as follows:

> *"Jurisdiction"*
>
> 1. "The Tribal Court shall have jurisdiction over all civil matters where all parties are Indians within the jurisdiction of the Court. The Tribal Court shall have civil jurisdiction over non-Indian [sic] in any particular case where they submit themselves to the jurisdiction of the court by instituting an action against an Indian and by filing cash bond in the amount of the damages asked, or by submitting himself to the Court's jurisdiction.

Id. The appellate court concluded that because the contractor had entered into contracts with an agency of the United States government in New Mexico, for performance upon the reservation, it would be deemed by virtue of such contract awards to have "submitted" to the jurisdiction.

The contractor and insurance company then filed this action in federal district court seeking injunctive relief from further proceedings in tribal court, and joining the tribal governmental entities as parties.

After various motions and gyrations, the Magistrate has recommended:

1. that defendants' motion to dismiss for lack of subject matter jurisdiction be denied;

2. that defendants' motion for admissibility of the tribal court record be granted;

3. that defendants' motion for oral hearing be denied;

4. that plaintiffs' motion for summary judgment be granted; and

5. that a permanent injunction issue prohibiting *Ernest v. Parisien* from proceeding further in Turtle Mountain Tribal Court.

An objection has been filed by the "tribal defendants" and joined in by Mr. Parisien. The learned discussions of proper policies towards enhancement of tribal sovereignty, etc., are interesting, but miss the point.

The Turtle Mountain Tribal Court has such jurisdictional authority as allowed it by Congress, and by its own statutory framework. Esoteric discussions of jurisdictional authority based on recent Circuit and Supreme Court decisions are totally academic if they relate to a power not granted or created by Title 2, Chapter 2.0102 of the Turtle Mountain Tribal Code.

The only basis for any jurisdictional claim would have to be predicated upon "or by submitting himself to the court's jurisdiction." The concept of "submission to the jurisdiction" is a familiar one in dealing with reservation matters. State and federal courts in many matters have jurisdiction over tribes and Indians only if the tribe or individual has "submitted" to the jurisdiction of the state or federal court.

One of the latest disussions in this area is that of *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), where the Eighth Circuit said: "*Santa Clara Pueblo* and its lineage compel us to conclude that nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation."

The Eighth Circuit, following a substantial number of decisions, refused to find that conduct of business can be deemed a consent to suit, instead holding that submission to federal court jurisdiction could be accomplished only by express and unequivocal waiver. The decision goes on to point out that the inclusion of such a waiver in the contract language was an option available to the parties, and that in its absence, no consent to suit could be implied from conduct in contract actions.

This court sees no rational basis for the adoption of a double standard regarding "submission to jurisdiction," and therefore holds that in contract disputes, *under the existing Tribal Code language*, tribal court jurisdiction over a non-Indian defendant can be acquired only if an express and unequivocal waiver is present. Should the Tribal Code be amended to provide a jurisdictional base over non-Indians arising from contract performance or commercial transactions within the exterior boundaries of the reservation, then philosophical discussions will become germane.

Turning specifically to the recommendation and objections:

1. The court hereby dismisses the action as to all "tribal defendants," such being:

Turtle Mountain Band of Chippewa Indians, through its chairman, Richard Lafromboise; the Tribal Council of the Turtle Mountain Band of Chippewa Indians, through is chairman, Richard LaFramboise; the Turtle Mountain Tribal Court, Beverly May in her official capacity as Judge of the Turtle Mountain Tribal Court;

pursuant to the request of the tribal defendants, as set out in the brief in opposition to the magistrate's findings, on the basis of sovereign immunity.

2. The court does find that plaintiffs have exhausted tribal court remedies *on the specific issue of jurisdiction,* the appellate court having ruled thereon.

3. That the recommendations, as set out in 1 through 5, on pages 8 and 9 of the Report and Recommendation are hereby expressly adopted and accepted by the court, and entry of final judgment is directed thereon.

Dated this 21st day of August, 1987.

Patrick A. Conmy
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

TWIN CITY CONSTRUCTION CO., OF FARGO, and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiffs,

v.

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS through its Chairman, Richard LaFromboise; The Tribal Council of the Turtle Mountain Band of Chippewa Indians, through its chairman, Richard LaFromboise; The Turtle Mountain Tribal Court, Beverly May in her official capacity as Judge of the Turtle Mountain Tribal Court; ERNEST V. PARISIEN, and ERNEST V. PARISIEN, d/b/a/ PARISIEN EXCAVATION,

Defendants.

Civil No. A2-86-124

REPORT AND RECOMMENDATION

Filed
June 30, 1987

This is an action for declaratory and injunctive relief filed by Twin City Construction and its bonding company, United States Fidelity & Guaranty Company (collectively "Twin City"). Twin City seeks a declaration that the Turtle Mountain Tribal Court lacks jurisdiction of the case *Ernest V. Parisien, d/b/a Parisien Excavation v. Twin*

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City Construction Company of Fargo, North Dakota & United States Fidelity & Guaranty Company and an injunction against further proceedings in that case.

This case, which challenges the scope of the Turtle Mountain Tribal Court's jurisdiction, is subject to the court's jurisdiction under 28 U.S.C. § 1331.[1] *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). The plaintiffs have filed a motion for summary judgment.

FACTS

In September 1981, Twin City Construction contracted with the Department of the Interior and the Bureau of Indian Affairs to construct the Turtle Mountain Community School, on the Turtle Mountain Indian Reservation.

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[1] The tribal defendants filed a suggestion of lack of subject matter jurisdiction on November 28, 1986. *See* F.R. Civ. P. 12(h)(3). Following the issuance of the Supreme Court's decision in *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), the tribal defendants filed a brief stating their "suggestion of lack of subject matter jurisdiction is incorrect." Tribal Defendants' Supplemental Brief on Iowa Mutual Ins. Co. v. LaPlante, Docket entry 46 at 2, n.2. The court finds that it does have subject matter jurisdiction of this case. The court will treat the tribal defendants' suggestion as a motion to dismiss and recommend that it be denied. In conjunction with their motion, the tribal defendants ask the court to take judicial notice of and rule on the admissibility of the tribal court record involving Parisien and Twin City. Opposing counsel does not resist the motion and the court has considered the record with the present motion. Because the court has considered the unopposed record, an implicit finding of admissibility has been made, and the motion has in effect been granted.

United States Fidelity and Guaranty Company issued the payment and performance bonds for Twin City on the project. On October 7, 1981, Twin City engaged an enrolled member of the Turtle Mountain Band of Chippewa Indians, Ernest V. Parisien, d/b/a Parisien Excavation, as a subcontractor to perform sewer work on the project. The relationship between Twin City and Parisien failed, and Parisien, a tribal member, sued Twin City in the Turtle Mountain Tribal Court for breach of contract damages.

The case took a circuitous path through the tribal courts.[2] Ultimately, the Turtle Mountain Tribal Court decided that it lacked jurisdiction and dismissed the case. The Turtle Mountain Court of Appeal reversed that decision and found that the tribal court did have jurisdiction. Twin City then filed this action, seeking a declaration that the tribal court lacks jurisdiction and an injunction to prevent the tribal case from progressing.

The plaintiff has moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. Summary judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. F. R. Civ. P. 56(c). The parties do not dispute the material facts. The only issue is whether the plaintiff is entitled to judgment as a matter of law.

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[2] The Turtle Mountain tribal court system is two-tiered. The trial court is the Turtle Mountain Tribal Court. The appellate court is the Turtle Mountain Court of Appeal.

TRIBAL POWER

In cases involving tribal jurisdiction, the initial inquiry regarding tribal jurisdiction must occur in the tribal courts. *National Farmers Union*, 471 U.S. 855-56. Parties challenging tribal jurisdiction must exhaust available tribal remedies before proceeding in federal court. *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971, 977 (1987). In this case, both the tribal trial court and tribal court of appeal have ruled on the jurisdictional issue. No other tribal remedies exist. Consequently, this court may properly consider the plaintiff's challenge to the tribe's power to assert jurisdiction over the plaintiffs.

Tribal power has two sources. The first is inherent retained tribal power. Inherent power may be exercised to the extent it has not been abrogated by federal statute or treaty. *Iowa Mutual*, 107 S.Ct. at 975-76. The second is a congressional grant of tribal power. The parties do not contend there is a grant of congressional power in this case. Both argue the existence or nonexistence of inherent retained power by the tribal court to assert jurisdiction over Twin City.

The scope of tribal inherent power oven non-Indians is not clearly defined. *Superior Oil Co. v. United States*, 798 F.2d 1324, 1329 (10th Cir. 1986). The Supreme Court in discussing inherent tribal power has stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544,

564 (1981). In outlining the scope of inherent tribal power, the Court has further stated:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. . . .

Id. at 565-66 (citations omitted).[3]

In order to determine whether inherent tribal power encompasses the exercise of civil jurisdiction over the

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[3] In considering application of *Montana* to the present facts, the court finds no cases on point. The Eighth Circuit, in *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986), made statements which follow *Montana*. In *Weeks*, a construction contractor sued a tribal housing authority for breach of contract. The issue was whether the district court had subject matter jurisdiction of the case. *Weeks*, 797 F.2d at 672. The Eighth Circuit affirmed the district court's dismissal of the case and required the plaintiff to file its case in tribal court for initial determination. Without reaching the merits, the court stated that the "Supreme Court has repeatedly recognized that tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring on a reservation," *Id.*, 673, and that the "power to hear and adjudicate disputes arising on Indian land is an essential attribute of that sovereignty." *Id.*

plaintiffs, the court must ascertain whether such exercise of jurisdiction is necessary to protect tribal self-government or to control internal relations. Resolving this issue depends largely upon the analytic approach to the facts. If the facts are considered narrowly, then a threat to tribal interests may exist. In particular, if the critical facts are that Twin City contracted to build a school for tribal use on tribal property, that the subcontractor is a tribal member, and that the contract was to be performed within the reservation, then a threat to tribal interests may arguably exist. On the other hand, if the facts are considered more broadly, by viewing the entire context of the construction contract, the critical facts are that Twin City entered into a contract with the United States through the Department of the Interior and the Bureau of Indian Affairs, that the performance of the contract only incidentally involved a building for tribal use, incidentally required performance within the reservation, and incidentally involved a tribal member subcontractor. In this context, any threat to tribal interests is minimal.

In choosing an approach to the facts, two considerations are helpful. First, *Montana*, states that inherent tribal power exists in areas where there is an effect on the interests of the tribe. *Montana* does not speak of protecting against a threat to individual tribal members, but rather against a threat to the integrity of the tribe itself. Second, the Eighth Circuit decision in *Weeks Construction, Inc. v. Ogala* [sic] *Sioux Housing Authority, supra*, helps identify the type of facts which could lead to the conclusion that tribal interests are threatened. In *Weeks*, the tribal housing authority was a party to the disputed contract. The present case is distinguishable from *Weeks*.

In this case, no tribal entity is a party to the litigation or to the construction contract.[4]

Based on these considerations, the court views the facts in the broader light, with the material facts involving a contract between Twin City and the United States, through the Department of the Interior and the Bureau of Indian Affairs, and the facts related to the reservation being only incidental to that contract. In essence, the dispute between Twin City and Parisien is simply a contractor-subcontractor dispute on a federal construction project. The tribe itself is neither a party to the dispute nor affected by the dispute as a tribe, except to the extent it may be incidentally affected as the ultimate user of the end product. The court discerns no threat to tribal self-government or to tribal control of internal relations, *Montana*, 450 U.S. at 564, which would support a finding of inherent power of the tribal court to exercise jurisdiction over Twin City. Consequently, plaintiffs are entitled to summary judgment as a matter of law.

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[4] This case is also distinguishable from *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, a non-Indian owned and operated a general store on a reservation. The store owner brought suit in state court to collect past due accounts from Indians living on the reservation. The Court held that the state court lacked jurisdiction of the case because the exercise of state jurisdiction would undermine the authority of tribal courts over reservation affairs and "would infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. In reaching this conclusion the Court noted that "[i]t is immaterial that the respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* The present case lacks the full intra-reservation character of *Williams*.

RELIEF

The relief sought in this case is both declaratory and injunctive. Declaratory relief is appropriate and an appropriate order is recommended. Whether injunctive relief should be granted is governed by *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981).[5] Although *Dataphase* applied to preliminary injunctions, the same factors apply to permanent injunctions. *Coleman v. Block*, 580 F.Supp. 194, 209-210 (D.N.D. 1984). The factors are as follows:

(1) the threat of irreparable harm to the movant;

(2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant;

(3) the probability of success on the merits; and

(4) the public interest.

Dataphase, 640 F.2d at 114 [sic] In applying these factors, the court finds that the plaintiffs' success on the merits is established. The court also finds a threat of irreparable harm to the plaintiffs. If an injunction is not granted, the plaintiffs may be subjected to proceedings brought by Parisien in a court lacking jurisdiction. If forced to litigate that claim, the plaintiff will incur the expense of litigation and possibly incur severe consequences from the issuance of a judgment against it by a court without jurisdiction.

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[5] The Anti-Injunction Act, 28 U.S.C. § 2283 does not prohibit an injunction in this case because tribal courts are not protected under that act. *U.S. v. Blackfeet Tribe*, 369 F.Supp. 565 (D. Mont. 1973).

In balancing the harm to the plaintiffs and the injury to Parisien, the court finds only minimal injury to Parisien. Parisien's course following issuance of an injunction is to file his suit in state court, as permitted by *Three Affiliated Tribes v. Wold Engineering*, 106 S.Ct. 2305 (1986). Consequently, the court finds that the injury to Parisien resulting from an injunction is minimal and far outweighed by the degree of harm to Twin City. Last, the court finds that the public interest is served by the issuance of an injunction that keeps a party from being subjected to litigation in a forum without jurisdiction. For these reasons, a permanent injunction should be ordered.

Two other issues must also be addressed. The first is whether a hearing should be held in this case. The defendants have requested an oral hearing to argue the summary judgment motion and to address the issue of subject matter jurisdiction. A hearing should ordinarily be held before a permanent injunction is issued. A hearing is not required, however, if there are no triable issues of fact involved. *Professional Plan Examiners v. Lefante*, 750 F.2d 282, 288 (3rd Cir. 1984); *United States v. McGee*, 714 F.2d 607, 613 (6th Cir. 1983). In the present case, there were no genuine issues of material fact in the summary judgment motion. The defendant's controverted facts addressed issues relating to the underlying claim by Parisien against Twin City. None of the facts relating to the tribal power issue were disputed. Next, the court finds that the consideration of the *Dataphase* factors involved conclusions of law and facts not subject to dispute. Additionally, the court notes that the defendants' request to file additional briefs have been granted. Consequently, the court finds that this is a case in which oral hearing was not required.

Next, the injunction's scope must be defined. The tribal defendants have argued that they are neither subject to suit because of tribal immunity nor subject to injunction. This raises various complex legal issues which should be decided only if necessary. In this case, effective relief for the plaintiffs can be obtained by limiting the injunction to Ernest V. Parisien d/b/a Parisien Construction. Consequently, to avoid unnecessarily deciding issues of law and because no prejudice results to the plaintiffs, the injunction will not be directed against the tribal defendants.

IT IS RECOMMENDED that:

1) the defendant's motion to dismiss for lack of subject matter jurisdiction be denied;

2) defendant's motion for admissibility of the tribal court record be granted.

3) defendant's motion for oral hearing be denied;

4) plaintiff's motion for summary judgment be granted and that a declaratory judgment be entered that the Turtle Mountain Tribal Court has no jurisdiction over the case entitled *Ernest V. Parisien, d/b/a Parisien Excavation v. Twin City Construction Company of Fargo, North Dakota & United States Fidelity & Guaranty Company;* and

5) a permanent injunction be issued prohibiting Ernest V. Parisien, d/b/a Parisien Excavation from proceeding in the case *Ernest V. Parisien, d/b/a Parisien Excavation v. Twin City Construction Company of Fargo, North Dakota & United States Fidelity & Guaranty Company* in Turtle Mountain Tribal Court.

Dated this 30th day of June, 1987.

Karen K. Klein
United States Magistrate

TURTLE MOUNTAIN COURT OF APPEALS

TURTLE MOUNTAIN JURISDICTION

ERNEST V. PARISIEN, d/b/a PARISIEN EXCAVATION,
Appellant/Plaintiff,

v.

TWIN CITY CONSTRUCTION COMPANY OF FARGO, North Dakota, a corporation,

and

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellee/Defendants.

No. 85-___

TC Civil No. 84-0168

MEMORANDUM OPINION

Filed
June 6, 1986

Appeal from the Turtle Mountain Tribal Court

Honorable Theodore Weisenburger, Tribal Court Judge, Presiding

Before OLSON, Chief Appellate Judge, CHASKE, Appellate Judge, and PATNAUDE, Appellate Judge.

OLSON, Chief Appellate Judge:

OPERATIVE FACTS

This appeal is filled [sic] raising the issue of jurisdiction prior to there being a hearing on the facts of the case.

Therefore, the Court of Appeals will refer to briefs filed with the Court for a rendition of the facts.

Twin City Construction Company contracted with the Department of Interior and Bureau of Indian Affairs to build the Turtle Mountain Community School by contract dated September 24, 1981. Pursuant to that contract, Twin City Construction Company (Twin City) entered into a contract with the Plaintiff, Ernest V. Parisien, d/b/a Parisien Excavation (Parisien), to perform certain sanitary sewer, storm sewer and water sewer work by contract dated October 7, 1981.

A dispute arose as to the timeliness of performance of Parisien in December, 1982, [sic] Parisien was required to complete 250 lineal feet of pipe. Parisien responded that he was shutting down for the winter because of extreme cold and would not continue with the work until the following spring. Thereafter, Twin City by letter of December 17, 1982, informed Parisien that its subcontract was being taken over pursuant to contract. Thereafter, the work was performed by another party.

PROCEDURAL HISTORY

On March 15, 1984, attorney for Parisien, David Garcia commenced the action in Tribal Court. The defendants moved to quash subpeonas issued by the Tribal Court, Judge Victor DeLong, on the ground that the defendants were not subject to the jurisdiction of the Court.

On April 24, 1984, Judge DeLong denied the Twin Cities and U.S.F.&G.'s motion on "Determination that the Defendants, had submitted to the jurisdiction of the

Court by engaging in business on the Turtle Mountain Indian Reservation, and complying with the provisions of Tribal Ordinance pertaining to employment rights." (Judgment, September 20, 1984).

On September 20, 1984, a Default Judgment was entered against the defendants for $236,077.77 plus costs and attorney's fees.

The defendant replied to this Default Judgment by simultaneously filing an appeal (Special Appearance and Petition to Vacate Judgment, September 25, 1984) and by filing a Special Appearance and Motion to Vacate Judgment (September 28, 1984).

On December 11, 1984, it was stipulated and agreed among the parties that the judgment would be vacated and that the "Defendants will enter their general appearance in such matter and answer and counterclaim" (Order, December 11, 1984, Judge DeLong).

A new Summons and Complaint was issued on December 14, 1984. The defendants each separately filed Answers as "General Appearances."

The defendants then filed motions to Amend their Answer and Counterclaims as "special appearances" and filed a Motion to Dismiss (February 12, 1985) alleging that:

a. As non-enrolled business entities they were beyond the service of process of the Tribal Court, and

b. the Tribal Court lacks subject matter jurisdiction over this matter.

The Motions to Amend were allowed on March 25, 1985 by Judge Ted Weisenburger. On May 3, 1985, Judge Weisenburger dismissed the complaint of Parisien on the grounds that neither service of process or subject matter jurisdiction existed over either Twin Cities or U.S.F.&G.

Permission to appeal was timely filed and granted.

ISSUE

Whether an Indian Plaintiff has civil jurisdiction over a non Indian Defendant when the cause of action arises from a contract performed totally within the external boundaries of the reservation.

DISCUSSION

The civil jurisdiction of the Turtle Mountain Tribal Court is stated in Title 2, Chapter 2.0102:

"JURISDICTION"

1. "The Tribal Court shall have jurisdiction over all civil matters where all parties are Indians within the jurisdiction of the Court. The Tribal Court shall have civil jurisdiction over non-Indian in any particular case where they submit themselves to the jurisdiction of the Court by instituting an action against an Indian and by filing cash bond in the amount of the damages asked, or by submitting himself to the Court's jurisdiction."

In this case, as in any case where a defendant does not wish to come into a particular jurisdiction or forum, it can be argued that the defendant obviously does not submit himself to the Courts jurisdiction because he specifically objects to it. It is further tempting for the Court

to simply accept that position and dispose of the matter by agreeing that objection is the opposite to submission. A broader definition and meaning of submission must be examined in light of the extensive case law interpreting both civil jurisdiction and tribal sovereignty. These principles are drawn from no specific statute or treaty, but rather form a part of the federal common law. This cause of action involves a contract dispute arising totally within the boundaries of the Turtle Mountain Indian Reservation between an Indian plaintiff and non-Indian defendant. Defendant Twin Cities did extensive work on the reservation for several years involving millions of dollars of business and employed directly and by subcontract numerous Indian people.

Jurisdiction between the state courts and tribal courts depends on a number of factors including race and location of the cause of action. After extensive research and review of case law, civil jurisdiction is not easily or readily determinable. In every case involving these factors, the Courts must decide anew using the general principles of self determination, sovereignty and constitutional protections. While the parties in each case seek to establish their positions by precedent, no single embodiment of the law either statutory or case law dictates the specific rule as to jurisdiction of Indian over non-Indian in Tribal Court.

Defendant cites *Oliphant v. Suquamish Indian Tribe* 98 S.Ct. 1011, (1978) for the proposition that "upon incorporation into the territory of the United States, the Indian Tribes thereby come under the territorial soverignty [sic] of the United States and their exercixe [sic] of separate power is constrained so as not to conflict with the interest

of this overriding sovereignty. Therefore, their rights to complete sovereignty, as independent nations, are necessarily diminished. Powers of Tribal Courts must be affirmatively delegated to those Courts." (def. brief page 5) But *Oliphant* concerned only the criminal jurisdiction of the Tribal Courts. Nothing in the reasoning suggests that Indian civil or regulatory jurisdiction over non-Indians is inconsistant with Indian's dependent status – the test that *Oliphant* recognized for deciding which of their inherent sovereign powers Indian tribes have lost. 435 U.S. at 208.

In *Cardin v. De la Cruz* 671 F.2d 363 (1972), Appellee, plaintiff, a non-Indian sought to avoid tribal jurisdiction for building, health and safety regulations on his grocery store located on fee lands within the boundaries of the Quinault Indian Reservation. The district court enjoined enforcement of these regulations against the appellee after concluding, "in light of *Oliphant v. Suquamish Indian Tribe*, that the tribe lacks jurisdiction to enforce its regulations against a non Indian on land he owned in fee.["] The Appellate Court reversed stating:

> "To hold that Indian Tribes cannot exercise civil jurisdiction over non-Indians would, when combined with *Oliphant*, eliminate altogether any tribal jurisdiction over persons not members of the tribe, and thus reduce to a nullity the Supreme Court's repeated assertions that Indian Tribes retain attributes of sovereignty over their territory, not just their members. Further, tribal civil and regulatory jurisdiction over non-Indians have been explicitly approved in various contents. In *Williams v. Lee*, 358 U.S. 217, (1959), the Court held that tribal courts had exclusive jurisdiction over a civil suit by a non-Indian against reservation Indians arising out of a transaction on the reservation. In *Washington v. Confederate Tribes of the*

> *Colville Indian Reservation*, 477 U.S. 134, (1980), reservation Indians were held to have the power to tax non-Indian purchasers of goods on the reservation. And a tribal severance tax on oil and gas extracted by non-Indians from leased reservation land was upheld in *Merrion v. Jicarilla Apache Tribes* ___ U.S. ___, (1982)." page 366.

Further, the Court of Appeals addressed the issue of the exercise of general tribal power over non-Indians raising constitutional problems because it contradicted "the constitutional principle central to our notion of political justice", namely, "government by the consent of the governed."

> "The Supreme Court, in upholding a tribe's right to tax non-Indian enterprises operating on the reservation recently answered this concern. "Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little, if any, role in measuring the validity of an exercise of legitimate sovereign authority." *Merrion v. Jicarilla Apache Tribe*, (supra). Since the tribes regulation of appellee's business is "an exercise of legitimate sovereign authority, it cannot be overturned because of appellee's non-consent, page 367.

This Court is aware that regulation of building, health, and safety regulations is directly related to the health and welfare of the tribe as earlier defined in *Montana v. United States*, 450 U.S. 544, (1981), as one of the broad categories in which Indian tribes retain their sovereign powers, but also, *Cardin* addresses voluntary contractual relationship with the tribe or tribal members where the tribe has a legitimate interest.

In *Montana v. United States* (supra) the Crow tribe sought to regulate non-Indian hunting and fishing on

non-Indian lands, the river bed of the Big Horn River, within its course through the reservation. The Court held through the original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as relations between a tribe and nonmembers of the tribe. Yet the *Montana* decision acknowledged that the tribes have retained the power to impose certain kinds of regulations on the activities of a nonmember.

> "To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers, who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the *political integrity, the economic security, or the health or welfare of the tribe.*"

The governmental interests are the sum of the interest of its people, the opinions in *Williams v. Lee* and *Cardin v. De la Cruz* demonstrate this point clearly. The governmental interests that a tribe has in a single injury to a single tribal member cannot be divorced from the whole of like occurances. Viewed as a single incident, such an occurance, never will give rise to a governmental interest sufficient to justify tribal jurisdiction. Viewed as a part of a class of such occurance, however, contractual injury to a tribal member clearly affects the welfare of the

tribe and the tribe may bring its power to bear to redress the injury and govern the conduct causing it.

A tribal member has been allegedly injured in the course of his on-reservation activities. He alleges that his injury results from the breach of contract of a non-Indian entity doing business on the reservation. He has petitioned the Court, established by his tribe, for redress of this injury. The tribal interest is clear. Non-Indian conduct allegedly has affected directly the health and welfare of tribal member, and similar conduct, if repeated threatens the health and welfare of other tribal members. One cannot say, therefore, that the health and welfare of the tribe is unaffected or that the tribe lacks a governmental interest in the subject matter.

Finally *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, Docket No. 84-320 (1985) is cited by both plaintiff and defendant to support their respective positions. In that cause appellee, plaintiffs, took judgment by default when defendant, appellant, failed to answer the complaint in tribal court. Defendant then secured a Federal District Court injunction staying the tribal court judgment. Plaintiffs appealed. After determining that *Oliphant* should not extend to civil jurisdiction, the court examined the history of the development of civil and criminal jurisdiction. The Court stated:

> "Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. Rather, the existance and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered,

divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

We believe that examination should be conducted in the first instance in the tribal court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly administration of justice in the Federal Court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." Page 10

While *National Farmers Union Insurance Co.* cannot be cited as authority then for the proposition that plaintiff in the present case automatically has civil jurisdiction, this Court cannot ignore the Supreme Court direction in the support of the tribal courts. Therefore, it is held that the Turtle Mountain Tribal Court has civil jurisdiction of this matter.

TURTLE MOUNTAIN TRIBAL COURT

TURTLE MOUNTAIN JURISDICTION

ERNEST V. PARISIEN, d/b/a PARISIEN EXCAVATING,

Plaintiff,

v.

TWIN CITY CONSTRUCTION CO. OF FARGO, N.D., a corporation

&

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Defendants.

Civil No. 84-0168

JUDGMENT

Entered
May 3, 1985

The above entitled matter having come on for hearing on February 12, 1985, upon the motion of Defendant for dismissal of the Summons and Complaint based upon the lack of jurisdiction over Defendants, Twin City Construction Co. of Fargo, N.D. and United State Fidelity & Guaranty Company and it appearing to the Court that proper service of said Motion and Notice of Motion was made upon Plaintiff's attorney of record; and

The Plaintiff appearing through its counsel, David Garcia of Garcia & Garcia, and the Defendants, Twin City Construction Co. of Fargo, N.D. and United States Fidelity & Guaranty Company, having appeared through its counsel, Ronald H. McLean of Tenneson, Serkland, Lundberg, Erickson & Marcil, Ltd.; and

The Court having heard and considered the matter and being fully advised in the premises and having ordered the entry of judgment of dismissal of the above entitled matter, it appearing that the Turtle Mountain Tribal Court does not have jurisdiction over Defendants Twin City Construction Co. of Fargo, N.D. and United States Fidelity & Guaranty Company as the Defendants are not members of the Turtle Mountain Tribe nor have they submitted themselves to the Court's jurisdiction;

NOW, THEREFORE, upon the Motion of Tenneson, Serkland, Lundberg, Erickson & Marcil, Ltd., attorneys for Defendants, Twin City Construction Co. of Fargo, N.D. and United States Fidelity and Guaranty Company, and the Order of Court;

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's cause of action is hereby dismissed against the Defendants, Twin City Construction Co. of Fargo, N.D. and United States Fidelity & Guaranty Company.

Dated this 3rd day of May, 1985

Theodore Weisenburger
Tribal Court Judge

Supreme Court, U.S.
FILED
APR 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1618

In The

Supreme Court of the United States

October Term, 1988

Earnest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a tribal court have civil jurisdiction over a non-Indian defendant when the non-Indian defendant is not present on the reservation and when the civil contract dispute has no direct effect on the tribe as a whole?

2. Does a federal district court have the authority to determine that a tribal court has improperly asserted jurisdiction over a non-Indian defendant?

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No. 88-1618

In The

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October Term, 1988

Earnest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Twin City Construction Co. of Fargo, N.D. (Twin City)* contracted with the Department of the Interior and the Bureau of Indian Affairs in New Mexico to construct a school on the Turtle Mountain Reservation

* Twin City has no parent companies, subsidiaries, nor affiliates.

in North Dakota. Petitioner Ernest V. Parisien (Parisien) was a tribal member who performed work for Twin City by a subcontract dated October 7, 1981. In December 1982, Twin City took over work on the subcontract because Parisien refused to complete his work in a timely manner. When Twin City took over work on the subcontract, Parisien had already been paid at least 75% of the subcontract price.

In 1984, Parisien filed suit against Twin City in tribal court for the full amount of the subcontract, and for consequential damages allegedly resulting from breach of the subcontract. At the time Parisien commenced suit, Twin City was not performing work on the reservation. Twin City contended that the tribal court did not have jurisdiction of the matter.

The Turtle Mountain Tribal Court ruled that it did not have jurisdiction because Twin City was not a member of the tribe and had not submitted to the court's jurisdiction. (A-49). The Turtle Mountain Court of Appeals reversed. The tribal appellate court did not rest its conclusion upon the tribe's jurisdictional statute; instead, the tribal appellate court found that the tribal court could assert jurisdiction on the basis of federal common law. (A-42).

After the tribal appellate court issued its ruling, Twin City sought declaratory and injunctive relief in the United States District Court for the District of North Dakota. On August 21, 1987, the district court issued a permanent injunction, prohibiting Parisien from proceeding further with his action in tribal court. (A-22). The

court found that Twin City had not expressly submitted to the trial court's jurisdiction, a tribal code requirement for the assertion of jurisdiction. (A-25).

Parisien appealed and a divided panel of the Eighth Circuit Court of Appeals reversed. (A-6). Twin City's request for rehearing *en banc* was granted on November 10, 1988. (A-5). An equally divided *en banc* judgment was entered on January 11, 1989. (A-1). Judges McMillian, Bowman, Wollman, Magill, and Bean voted to affirm the district court's determination that the tribal court did not have subject matter jurisdiction. Chief Judge Lay and Judges Heaney, Arnold, John R. Gibson, and Fagg voted to reverse. Thus, the equally divided court affirmed the district court's judgment. (A-3).

Parisien has now petitioned this Court to issue a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Eighth Circuit. Twin City opposes Parisien's petition on the grounds that the Eighth Circuit's affirmance of the district court's decision is in accord with established United States Supreme Court precedent, there is no conflict between the circuits, and the district court correctly determined that the tribal court did not have subject matter jurisdiction over the dispute between Parisien and Twin City.

ARGUMENT

A. THE EIGHTH CIRCUIT DECISION IS CONSISTENT WITH ESTABLISHED PRECEDENT.

1. The Decision Conforms To Prior Supreme Court Decisions.

When the district court and the Eighth Circuit Court of Appeals addressed the issue of the extent of tribal jurisdiction over non-Indian defendants, the courts had guidance from a number of previous decisions by this Court. The Indian tribes have long been recognized as having the powers of a limited sovereign. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). The tribes retain those attributes of sovereignty which permit them to regulate and control internal tribal relations. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). However, certain attributes of tribal authority have been lost. *Montana v. United States*, 450 U.S. 544, 563 (1981).

One area in which sovereignty has been diminished is in the realm of authority over non-Indians. For example, Indian tribes do not have the inherent retained jurisdiction to try and punish non-Indians criminally. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). As to criminal jurisdiction, there is neither inherent tribal sovereignty nor congressionally delegated authority over non-Indians. *Id.* at 208. Thus, an important guidepost as to the reach of tribal court jurisdiction was established in *Oliphant*.

The nature of tribal sovereignty was also discussed in *United States v. Wheeler*. In *Wheeler*, this Court noted that implicit divestiture of tribal sovereignty has occurred with respect to the relations between an Indian tribe and

non-members of the tribe. *Id.* at 326. Both *Oliphant* and *Wheeler* addressed the question of the reach of the criminal jurisdiction of a tribal court. When this Court first commented on the extent of tribal power to exercise *civil* authority over the conduct of non-Indians, both criminal cases were relied upon. *See Montana*, 450 U.S. at 563-65.

In *Montana*, the issue was whether an Indian tribe could regulate hunting and fishing by non-Indians on lands within the reservation owned in fee simple by non-Indians. *Id.* at 547. One of the claimed grounds for the exercise of such power was that the tribe had retained the power as an incident of inherent sovereignty. *Id.* at 563. In an important statement regarding tribal authority, this Court noted that "the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependant status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564.

As a general rule, the reach of an Indian tribe's inherent sovereign powers does not extend to the activities of non-Indians. *Id.* at 565. However, there are limited instances in which the tribes have retained the power to exercise some form of civil jurisdiction over non-Indians. *Id.* Tribes may regulate the activities of non-members who enter consensual relations with the tribe or its members. *Id.* A tribe may also exercise civil authority if the non-Indian's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

An example of the tribe's authority to regulate the activities of non-Indians may be found in *Williams v. Lee*,

358 U.S. 218 (1959). In *Williams v. Lee*, this Court held that a non-Indian who operated a general store on an Indian reservation must sue an Indian defendant in tribal court to collect for goods sold to the Indian on the reservation. The non-Indian plaintiff operated his reservation store under a federally-mandated license which required that the store owner submit to regulations prescribed by the Commissioner of Indian Affairs for the protection of Indians. *Id.* at 217 n.1. The holding in *Williams v. Lee* should be limited to its facts: a non-Indian plaintiff must sue an Indian defendant in tribal court. *Williams v. Lee* offers no guidance as to whether a non-Indian defendant is subject to the jurisdiction of the tribal court after the non-Indian defendant is no longer present and doing work on the reservation.

The authority to regulate a non-Indian's conduct generally relates to taxation, licensing or other forms of regulation. *Montana*, 450 U.S. at 565. Presumably, civil jurisdiction over non-Indians would extend to enable enforcement of such regulation. However, Parisien's suit against Twin City does not contemplate any enforcement of a regulation, so *Montana* does not support the assertion of jurisdiction over the Parisien/Twin City dispute.

A tribe's sovereignty also extends to conduct which has a direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566. In *Montana*, this Court found that the non-Indian hunting and fishing did not threaten the tribe's political or economic security. *Id.* The dispute between Parisien and Twin City similarly does not threaten the tribe as a whole. The dispute is a simple contract dispute, regarding payment on a subcontract.

Magistrate Karen Klein's report and recommendation filed on June 30, 1987 in this case found that the tribe was not affected by the dispute as a tribe. (A-33). She further found that there was no threat to tribal self-government or to tribal control of internal relations. *Id.* Thus, the district court's ruling that the tribal court did not have jurisdiction over Twin City is consistent with *Montana.*

Petitioner contends that two relatively recent cases support the proposition that tribal court jurisdiction of non-Indian defendants is presumed. First, petitioner relies upon *National Farmers Union Insurance Co. v. Crow Tribe,* 471 U.S. 845 (1985). In *National Farmers Union,* a non-Indian defendant objected to the tribal court's assertion of civil jurisdiction. Petitioner contends that this Court's holding was "that tribal civil adjudicatory jurisdiction has not been generally divested or implicitly limited by federal law." Petitioner's brief at 15. A more precise statement of the holding of *National Farmers Union* is that a non-Indian defendant must first exhaust his tribal court remedies before asking a federal court to determine whether a tribal court has exceeded the limits of its jurisdiction. 471 U.S. at 857. In fact, this Court decided nothing as to the reach of a tribal court's jurisdiction, but merely ruled that a tribal court must carefully examine tribal sovereignty, the extent to which the sovereignty has been divested or diminished, and federal statutes and policies which might affect tribal jurisdiction. *Id.* at 855-56. Thus, *National Farmers Union* does not support the proposition that jurisdiction over a non-Indian defendant is presumptively in the tribal court.

The other recent case relied upon by petitioner is *Iowa Mutual Insurance Co. v. LaPlante,* 480 U.S. 9 (1987). In

Iowa Mutual, the issue was whether the diversity statute was a congressional limitation on a tribe's jurisdiction. *Id.* at 11. In ruling that the diversity statute was not a diminishment of tribal authority, the Court held that the non-Indian defendant must first exhaust the available tribal court remedies before commencing suit in federal court. *Id.* at 19.

Petitioner relies upon language in *Iowa Mutual* which states that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18. In order to determine whether petitioner's allegation that jurisdiction over the Parisien/Twin City dispute "presumptively" lies in the tribal court, it is important to analyze what the Court meant by "such activities." The phrase "such activities" refers to the comment that tribal authority over the activities of non-Indians is an important aspect of tribal sovereignty. *Id.* at 18. When making the comment, the court specifically referred to certain cases which help define those activities as to which there may be tribal jurisdiction over non-Indians.

One of the cases relied upon to describe the activities was *Montana*. *Montana* held that a tribe may *regulate* the activities of non-members who enter into consensual relations with the tribe and may exercise civil authority if there is a direct effect on the tribe as a whole. *Montana*, 450 U.S. at 565. Neither condition is present in the Parisien/Twin City dispute, so the "presumptive" jurisdiction would not lie.

In addition to *Montana*, the *Iowa Mutual* Court referred to *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In *Washington v. Confederated Tribes*, the Court held that the state of Washington could properly tax sales to non-members of the tribe, but not sales to members. *Id.* at 159-61. Although the Court was not discussing civil jurisdiction, tribal sovereignty was found not to preclude a state's decision to impose taxes on sales both to non-Indians and to Indians resident on the reservation but not enrolled in the tribe. *Id.* Thus, this Court has recognized that a tribe is sovereign with respect to its own members, but to a lesser extent with non-Indian activities on the reservation. *Iowa Mutual* does not require a finding that a non-Indian defendant is subject to the jurisdiction of the tribal court.

The most relevant Supreme Court precedent regarding tribal court jurisdiction over non-Indian defendants is, therefore, found in *Montana*. Because this case does not involve regulation of the activities of non-Indians who come in contact with the tribe or tribal members, and because Parisien's dispute with Twin City has no direct effect on the tribe, the district court properly issued an injunction prohibiting Parisien from proceeding further with the tribal court action. The Eighth Circuit affirmance of the district court's opinion was in accordance with Supreme Court precedent.

2. No Conflict Exists Between the Circuits.

Petitioner contends that the Eighth Circuit decision conflicts with the Ninth Circuit decision in *Sanders v.*

Robinson, 864 F.2d 630 (9th Cir. 1988). Although the *Sanders* court found that the tribal court had jurisdiction over a non-Indian defendant, the *Sanders* decision is distinguishable from the present case and does not present a conflict between circuits. *Sanders* involved a divorce and custody proceeding in which the children were members of the tribe and had resided upon the reservation during the marriage. *Id.* at 632. The *Sanders* decision was consistent with *Montana;* the tribal court had jurisdiction because the welfare of the tribe as a whole was affected by the divorce because of the status of the children as tribal members. *See Mississippi Band of Choctaw Indians v. Holyfield*, 57 U.S.L.W. 4409, 4414 (U.S. April 3, 1989) (tribal court had jurisdiction over adoption of Indian children because of impact on Indian children and tribe).

Sanders is also distinguishable because the Ninth Circuit did not decide whether the tribal court jurisdiction was exclusive. 864 F.2d at 633. The *Sanders* court relied upon the tribal code which gave the Tribal Council power to regulate domestic relations of tribal members and of non-members married into the tribe. *Id.* The conclusions reached by the *Sanders* court give no indication that the Ninth Circuit would decide the Parisien/Twin City dispute any differently than the Eighth Circuit. The dispute does not involve custody matters which may have a direct effect on the tribe. Therefore, there is no conflict in the circuit courts which this Court needs to resolve.

B. THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE TRIBAL COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

1. A Federal District Court Has the Authority to Decide Whether a Tribal Court Has Asserted Jurisdiction Beyond Lawful Limits.

Petitioners contend that the district court of North Dakota was bound by the tribal appellate court's declaration that the tribal court had subject matter jurisdiction of this matter. Such a position is inconsistent with the rulings in *National Farmers Union* and *Iowa Mutual*. Both cases held that although exhaustion of tribal remedies was required, a federal court may determine whether the tribal court lacked jurisdiction. *National Farmers Union*, 471 U.S. at 845; *Iowa Mutual*, 480 U.S. at 619. The district court in this matter did what it was permitted to do; it decided that the tribal court exceeded its jurisdictional boundaries when it asserted jurisdiction over the suit between Parisien and Twin City.

The Eighth Circuit properly affirmed the district court's issuance of the injunction in this matter because the tribal court had no basis for asserting jurisdiction. In concluding that the tribal court had jurisdiction, the tribal appellate court did not analyze any specific statute, treaty, or local Turtle Mountain history. Instead, the tribal appellate court interpreted federal common law. (A-42). Because the tribal appellate court did not interpret tribal law and instead merely interpreted federal common law, the tribal appellate court's decision was not entitled to any special deference.

Petitioner suggests that the tribal appellate court decision is as binding as the highest state court's interpretation of state law. However, in this case the tribal court interpreted federal, rather than tribal, law. In those instances when a state court interprets federal law, the federal court need not defer to the state court's interpretation. *See Townsend v. Sain*, 372 U.S. 293, 318 (1963). Because the tribal court decided that federal common law permitted the tribal court to assert jurisdiction in this matter, the federal district court and the Eighth Circuit Court of Appeals properly determined that federal law did not permit such assertion of jurisdiction.

The Eighth Circuit ruling does not conflict with the Ninth Circuit's decision in *Sanders v. Robinson*. It is true that in *Sanders* the Ninth Circuit noted that a tribal court's interpretation of tribal law was binding on the court. 864 F.2d at 633. The Ninth Circuit went on to note, however, that "a federal court must still, under § 1331 decide whether a tribal court has asserted its jurisdiction beyond lawful limits." *Id.* Thus, both the Eighth Circuit and the Ninth Circuit recognize that a district court has the authority to determine whether a tribal court has exceeded its jurisdictional limits.

2. The Tribal Code Did Not Permit the Assertion of Jurisdiction.

The tribal code in effect at the time Parisien commenced his suit provided that the tribal court shall have civil jurisdiction over non-Indians if the non-Indian submits himself to the court's jurisdiction. Turtle Mountain Tribal Code § 2.0102(1) (1976). The tribal appellate court acknowledged that Twin City did not expressly consent

to tribal court jurisdiction. The district court issued its injunction in this matter because Twin City did not submit to the jurisdiction of the tribal court. (A-25). Thus, both the tribal appellate court and the district court agreed that Twin City did not expressly submit to the jurisdiction of the tribal court.

Instead, the tribal appellate court found that Twin City implicitly submitted to the jurisdiction of the tribal court. The tribal appellate court based its decision upon an analysis of federal common law. As noted above, the tribal appellate court's interpretation of *Montana* and other Supreme Court cases was in error and the Eighth Circuit properly affirmed the determination that the tribal court had no jurisdiction.

In an apparent recognition that the tribal code did not permit the assertion of jurisdiction over a defendant such as Twin City, the Turtle Mountain Band of Chippewa Indians revised the jurisdictional statute one month after the district court's decision. The petitioner contends that the amended code applies and that Twin City was subject to jurisdiction pursuant to the amended code. Although a court is to apply the law in effect at the time a court renders a decision, this rule is changed if manifest injustice results. *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). To determine whether it is unjust to apply a law in effect at the time of an appellate decision, a court must analyze "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717.

When a change effects a substantive right, it should not be presumed to operate retroactively. *Bennett v. New*

Jersey, 470 U.S. 632, 638 (1985); *Hasse v. American Photograph Corp.*, 299 F.2d 666, 668 (10th Cir. 1962); *Rogers v. Firestone Tire and Rubber Co.*, 599 F.Supp. 676, 677 (S.D. Fla. 1984). For that reason, a tribe's attempt to amend a jurisdictional statute in an attempt to cure a jurisdictional defect cannot have retroactive operation. *R. J. Williams Co. v. Fort Belknap Housing Authority*, 509 F.Supp. 939, 938 n.2 (D. Mont. 1981).

It would be manifestly unjust to apply the 1987 jurisdictional statute retroactively to Parisien's claim against Twin City. At the time Twin City entered into the subcontract with Parisien, the tribal court could assert jurisdiction over a non-Indian only if the non-Indian submitted to the jurisdiction of the tribal court. Undoubtedly, those in business consider jurisdictional questions when entering into commercial transactions. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482 (1985) (choice of law provisions in contract considered for jurisdiction). Because it would be unjust to apply the amendment retroactively, the original tribal code provision should be the only jurisdictional basis considered.

Finally, even if the amended statute is applied the Eighth Circuit's decision should not be modified. The tribe's attempt to assert jurisdiction is impermissible in light of *Montana*. Therefore, the Eighth Circuit's affirmance of the district court's decision was proper and need not be further reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied. Twin City exhausted its tribal court remedies before it sought the protection of the district court. The district court properly issued an injunction because the tribal court attempted to assert jurisdiction beyond its lawful limits. The Eighth Circuit Court of Appeals' affirmance of the district court's decision is consistent with prior Supreme Court opinions and is not in conflict with any other circuit decision.

Respectfully submitted,

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No. 88-1618

In The

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Ernest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

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v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, et al., (additional amici listed inside) IN SUPPORT OF PETITIONER

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Pueblo de Cochiti;
Red Lake Band of Chippewa Indians;
Saginaw Chippewa Indian Tribe;
Saint Regis Mohawk Tribe;
Winnebago Tribe of Nebraska;
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No. 88-1618

In The

Supreme Court of the United States

October Term, 1988

Ernest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, et al., IN SUPPORT OF PETITIONER

Pursuant to Rule 36.1, *amici curiae* consisting of fifteen (15) federally recognized Indian tribes, and one national Indian organization, respectfully move this Court for leave to file the attached brief *amici curiae* in support of Ernest V. Parisien's petition for a writ of *certiorari* in the above-captioned case. Petitioner consents

but respondent Twin City Construction Company of Fargo objects to the filing of the brief of *amici*, and therefore this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by petitioner in this case. The result of the equally divided *en banc* Eighth Circuit Court of Appeals seriously erodes tribal sovereign rights and threatens effective protection of the rights of all individuals, Indian and non-Indian, on Indian reservations. The interest of the *amici* is described more fully in their proposed brief attached to this motion.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition are of substantial importance. Such issues involve tribal court jurisdiction over reservation-based civil actions brought by tribal members against non-Indians; and the extent to which federal courts are bound by decisions of the highest tribal courts on issues of purely tribal law. These issues go to the heart of the ability of Indian tribes to be self-governing within their reservations. They are important issues throughout Indian country.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, et al. IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Amicus curiae, the Turtle Mountain Band of Chippewa Indians (the Tribe), is a federally-recognized Indian tribe, organized under a constitution approved by the United States Secretary of the Interior on June 16, 1959. The Tribe has about 25,000 members. Over 10,000 members live on

or near the Tribe's 33,000 acre Reservation. The Reservation is located entirely within the state of North Dakota.[1]

The other *amici* tribes are federally-recognized Indian tribes located throughout the United States. The National Indian Justice Center is an Indian owned and operated non-profit organization created in 1983. The Center provides technical assistance to tribal courts in their administration of justice throughout Indian country.

Amici oppose the result below holding that tribal courts lack jurisdiction over a civil action, brought by a tribal member against a non-Indian, which action arose out of the on-reservation performance of a federal contract to build a tribal school on tribal land for attendance primarily by Indian students. On most Indian reservations, the presence of non-Indians, especially those doing business with tribal members, is an everyday fact of life. The authority of tribal courts to resolve disputes arising out of the activities of non-Indians on tribal land and involving tribal members, is crucial. Without this authority, tribes cannot adequately protect and enforce the rights under federal law and tribal law of all people on their reservations.

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[1] The Tribe's constitution expressly provides for the creation of a tribal court system. T.M.C. Const. art. IX, § 5. In addition, the Tribe has a written Law and Order Code which was approved by the Secretary of the Interior in March, 1976. T.M.C.T.C. (1976). The Code includes sections on civil procedure, 2 T.M.C.T.C. §§ 2.0101 – 2.1501, and evidentiary rules, 3 T.M.C.T.C. §§ 3.0101 – 3.0316, in tribal court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

It is well-established that tribal courts have exclusive jurisdiction under federal law over reservation-based civil actions brought by non-Indians against tribal members. The result below holds that tribal courts lack jurisdiction over the reverse situation – a reservation-based civil action brought by a tribal member against a non-Indian. There is no valid reason for distinguishing the situations, and therefore the result below is in error.

It is implicit in decisions of this Court and federal policy that federal courts must defer to judgments of tribal courts. But the federal district court in this case substituted its own interpretation of an issue of purely tribal law for that of the tribal court of appeals. That lack of deference is intolerable. It threatens tribal self-determination as provided for by Congress and as interpreted by this Court. It in effect renders the Indian abstention and exhaustion doctrines announced by this Court nugatory. It implies that tribal courts are incapable of construing their own laws, despite many decisions of this Court upholding their competency and integrity.

This Court should grant review in this case to bring the result below in line with its decisions in the area of tribal court civil jurisdiction, and with the federal policy of encouraging tribal self-determination and self-government.

REASONS FOR GRANTING THE WRIT

Amici adopt the reasons for granting the writ as set forth by petitioner in his petition for a writ of *certiorari*. In

addition, *amici* offer the following reasons for granting *certiorari* in this case.

I. THE RESULT BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *WILLIAMS V. LEE.*

Thirty years ago, in the seminal case of *Williams v. Lee*, 358 U.S. 217 (1959), this Court held that exclusive jurisdiction over reservation-based civil actions by non-Indians against tribal members is in the tribal courts. 358 U.S. at 223. Since that decision, *amici* and other Indian tribes have been exercising jurisdiction over reservation-based civil actions by non-Indians against tribal members under *Williams v. Lee*, a case which this Court has repeatedly cited with approval. *See, e.g., Montana v. United States*, 450 U.S. 544, 564-566 (1981). Petitioner's case is the mirror image of *Williams v. Lee*; it involves tribal court jurisdiction over a reservation-based civil action by a tribal member against a non-Indian.

The *en banc* Court of Appeals for the Eighth Circuit has failed to uphold tribal court jurisdiction over petitioner's case. Such a result is irreconcilable with *Williams v. Lee*. There is no valid reason for upholding tribal court jurisdiction over *Williams v. Lee*-type situations involving a non-Indian plaintiff and an Indian defendant, and denying tribal court jurisdiction over those such as petitioner's case involving an Indian plaintiff and a non-Indian defendant. This Court should grant review in this case to bring the result below in line with the well-established holding of *Williams v. Lee*.

II. THE RESULT BELOW SANCTIONS THE FAILURE OF FEDERAL COURTS TO DEFER TO A TRIBAL COURT JUDGMENT, IN CONTRAVENTION OF DECISIONS OF THIS COURT AND FEDERAL POLICY REJECTING SUCH INTRUSIONS ON TRIBAL SOVEREIGNTY.

A. Substitution of Federal Court Judgments For Tribal Court Judgments On Tribal Law Issues Seriously Threatens Tribal Self-Determination And Cultural Integrity.

In this case, the Turtle Mountain Chippewa Court of Appeals construed a provision of the Turtle Mountain Chippewa Tribal Code. Ignoring the Tribal Court of Appeals' interpretation of the tribal code provision, the federal district court *substituted* its own interpretation of the provision. This substitution is an extremely serious affront to tribal self-determination and self-government.

Where issues of purely tribal law are involved, substitution by federal courts of their own interpretations for the interpretations of tribal courts is inherently and blatantly inconsistent with the federal policy of encouraging tribal self-determination. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (*Martinez*), this Court precluded federal judicial review of tribal court decisions interpreting the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, except as expressly provided for by writs of habeas corpus. 436 U.S. at 59-72. The Court found that Congress had specifically considered and rejected such review on the grounds that it would "intrude needlessly on tribal self-government," *Id.* at 71, and in particular it would "displace tribal courts." *Id.* at 67.

The Court in *Martinez* noted that issues under the Indian Civil Rights Act, especially those "likely to arise in

a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." *Id.* at 71. Therefore, "efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72.

The reasoning of *Martinez* applies even more forcefully in this case. If federal courts may not substitute their interpretations of federal law under the Indian Civil Rights Act for those of tribal courts, *a fortiori* they may not substitute their interpretations of purely tribal law. Such substitutions, as *Martinez* recognizes, would completely undermine tribal sovereignty and erode tribal culture.

This principle of federal court restraint in reviewing tribal court decisions interpreting tribal-made law also underlies this Court's decision in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*Iowa Mutual*). *Iowa Mutual* extended the Indian abstention and exhaustion doctrines to cases brought under the federal diversity statute, 28 U.S.C. § 1332. This Court therein reaffirmed that a "federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts. . . ." 480 U.S. at 15. "Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16. "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." *Id.* at 17.

Plainly, the result below is contrary to decisions such as *Martinez* and *Iowa Mutual* recognizing the "federal policy of deference to tribal courts" concerning the interpretation and application of tribal law. *Iowa Mutual*, 480 U.S. at 17.[2] This Court should grant review in this case to establish the principle that federal courts must defer to tribal court decisions on purely tribal law issues, and to establish an appropriate standard of deference consistent with its cases and federal policy. For tribes throughout the country, with ever-growing bodies of tribal law, such principles and standards are vital to maintaining their political and cultural independence.[3]

B. The Failure Of Federal Courts To Accord Any Deference To Tribal Court Judgments Renders The Indian Abstention And Exhaustion Doctrines Superfluous.

Besides being irreconcilable with *Williams v. Lee*, and the longstanding congressional policy of respecting tribal self-determination, the result below is inconsistent with the Indian abstention and exhaustion doctrines announced by this Court in *National Farmers Union Ins.*

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[2] In addition, as Petitioner points out, the result below directly conflicts with a decision of the Court of Appeals for the Ninth Circuit holding that decisions of the highest tribal court on issues of purely tribal law are binding on the federal courts. *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988).

[3] *See, e.g., FMC Corp. v. Shoshone-Bannock Tribes*, No. 87-4059 (D. Idaho Apr. 14, 1989) (citing *Sanders v. Robinson* with approval); *but cf. Crow Tribe of Indians v. United States*, No. 78-110 (D. Mont. Mar. 15, 1989) (holding that where a federal court action is not a direct appeal from tribal court, a ruling on tribal law by a tribal court in a separate action has no binding effect on the federal court).

Cos. v. Crow Tribe, 471 U.S. 845 (1985) (*National Farmers*) and *Iowa Mutual*.

In *National Farmers*, this Court held that federal courts must abstain from exercising jurisdiction over challenges to tribal jurisdiction based on specific federal statutes or treaties, until tribal remedies have been exhausted. 471 U.S. at 853-855. This holding, reasoned the Court, is most consistent with the federal policy of encouraging tribal self-government and self-determination. *Id.* at 856. It also will permit tribal courts to develop a "full record" on their jurisdiction. *Id.* at 856-857. Other courts will benefit from the record and the expertise of tribal courts in the area of tribal jurisdiction, if review of tribal decisions occurs. *Id.* at 857.

The Indian abstention and exhaustion doctrines were extended to federal diversity cases in *Iowa Mutual*. 480 U.S. at 16-17. In so holding, the Court recognized the "vital role" that tribal courts play – as supported by federal policy – in tribal self-government over reservation affairs, including the activities of non-Indians. *Id.* at 14. "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a 'full opportunity to determine its own jurisdiction.' " *Id.* at 16.

Hence, *National Farmers* and *Iowa Mutual* establish review of tribal court decisions on the record. *National Farmers*, 471 U.S. at 856-857; *Iowa Mutual*, 480 U.S. at 16-17. The clear implication from these decisions is that federal courts must defer to tribal decisions. The complete failure of the federal district court in this case to

accord any deference to the tribal court judgment on the tribal law issue, as well as on the federal law issue, in effect renders the abstention and exhaustion doctrines superfluous.[4]

C. The Lack Of Deference Also Implies That Tribal Courts Are Incompetent, An Implication Soundly Rejected By This Court.

The result below is also an affront to the integrity and competence of tribal courts. The federal district court, in substituting its interpretation of tribal law for that of the Tribal Court of Appeals, refused to accord any deference to the interpretation of the Tribal Court of Appeals regarding its own law. The inescapable implication of the decision is that tribal courts are not to be trusted to interpret their own tribal laws, not to mention federal laws applicable to the Tribe. Such implication is completely contrary to decisions of this Court avowing its belief in the integrity and competence of tribal courts.

Just this term, in *Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989) (*Holyfield*), the

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[4] *Amici* recognize that, in addition to the issue of the binding effect of tribal court decisions on tribal law, this case presents an issue of the deference federal courts should accord tribal court decisions on federal law. *Amici* submit that decisions of this Court, and federal policy, support a standard of deference to tribal decisions on federal law which may, in some instances, be less strict than the standard applicable to tribal court decisions on issues of purely tribal law. Nevertheless, the federal district court's refusal to give any deference to the Tribal Court of Appeals on the tribal law issue in itself renders the decision below in error and worthy of review by this Court.

Court held that under the Indian Child Welfare Act, 25 U.S.C. § 1911(a), exclusive jurisdiction over custody proceedings involving Indian children born off the reservation is in the tribal courts. In so concluding, the Court expressly stated that, as to the ultimate placement of the children, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts. . . ." *Holyfield*, 57 U.S.L.W. 4409, 4415 (U.S. Apr. 3, 1989).

Earlier, in *Martinez*, in refusing to permit federal judicial review of tribal court actions under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, except by writs of habeas corpus, the Court stated, "[t]ribal forums are available to vindicate rights created by the ICRA, and . . . [t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," 436 U.S. at 65, and as "competent law-applying bodies." *Id.*

Finally, in *Iowa Mutual*, this Court unequivocally reaffirmed its long-standing rejection of the argument that tribal courts are incompetent as a basis for denying tribal jurisdiction. 480 U.S. at 17-19. "We have rejected similar attacks on tribal court jurisdiction in the past." *Id.* at 19. Such allegations are "contrary to the congressional policy promoting the development of tribal courts." *Id.*

The result below is contrary to all of these cases acknowledging the integrity and competency of tribal courts. Review should be granted to bring it in line with this Court's previous decisions, and with the federal policy of encouraging tribal self-government within Indian reservations.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* to review the *en banc* judgment of the equally divided Eighth Circuit Court of Appeals.

Respectfully submitted,

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No. 88-1618

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The Brief in Opposition confirms that guidance is needed in the proper application of this Court's cases to issues involving the civil jurisdiction of tribal courts over reservation-based actions brought by tribal members against non-Indians. Twin City Construction Company of Fargo (Twin City) argues that such issues are governed by *Montana v. United States*, 450 U.S. 544 (1981) *(Montana)*,

see Brief in Opposition at 5-7; 8-9; & 14, and not by *Williams v. Lee*, 358 U.S. 217 (1959), a case which specifically addresses the civil jurisdiction of tribal courts, and which Twin City does not attempt to distinguish.

ARGUMENT

Pursuant to Rule 22.5, in reply to the Brief in Opposition filed in this case by Twin City, petitioner Ernest V. Parisien (Parisien) hereby asserts the following:

1. Even assuming *arguendo* that *Montana* applies here, the result below and *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988) are in conflict, and Twin City's contentions to the contrary are in error. Twin City argues that enjoining Parisien from adjudicating his contract dispute in tribal court is not the kind of "direct effect" on tribal interests which under *Montana* would sustain jurisdiction. Brief in Opposition at 9-10.

However, the direct effect in this case could not be clearer: it involves the authority of tribal courts to resolve a dispute arising on tribal land from a subcontract between a tribal member and a non-Indian who was building a tribal school for attendance primarily by Indian students. This Court has long held that a tribe's governmental interest in exercising adjudicatory jurisdiction over an on-reservation civil cause of action involving a tribal member is sufficient to vest the tribe with such authority, notwithstanding the fact that a non-Indian is a party to the case. *Williams v. Lee*, 358 U.S. at 223. This case invokes the same essential tribal interests as were involved in *Williams v. Lee*, and in cases upholding tribal

court jurisdiction over the custody of Indian children, *e.g., Sanders v. Robinson; Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989).[1]

2. Twin City's characterization of the Tribal Court of Appeals' interpretation of the Tribal Code as involving an issue of federal law, not tribal law, is incorrect. Brief in Opposition at 2 & 13. In this case, in construing the scope of the Tribal Code, §2.0102, the Tribal Court of Appeals "borrowed" principles of federal law and common law and adopted them as rules of decision. (A-41 through A-42). Such borrowing of rules of decision from another forum does not transform an issue of purely tribal law into one of federal law. *See* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* §4031 (1977) (where state court, in interpreting state law, voluntarily incorporates federal rule of decision, such incorporation does not create original federal question jurisdiction).

3. Regarding the issue of deference to tribal courts on the tribal law issue, the procedural facts of this case and those of *Sanders v. Robinson* are identical. In both cases, the non-Indians raised an issue of purely tribal law: whether tribal court jurisdiction was prohibited

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[1] Twin City also attempts to distinguish *Sanders v. Robinson* on the grounds that the Court of Appeals for the Ninth Circuit did not reach the issue of whether tribal court jurisdiction is exclusive or concurrent with that of state courts. Brief in Opposition at 10. However, that issue was not raised in *Sanders*, nor is it an issue in this case. Therefore, the fact that the Ninth Circuit did not reach the issue has no bearing on whether *Sanders* and the result below are in conflict.

under tribal law. In both cases, the highest tribal court construed the tribal law at issue. But unlike *Sanders*, the federal courts in this case failed to defer to the decision of the tribal court. Therefore, the result below is in conflict with the holding of *Sanders v. Robinson*, 864 F.2d at 633, that decisions of the highest tribal court on issues of purely tribal law are binding on the federal courts. Twin City's statement that this case and *Sanders* are not in conflict, Brief in Opposition at 12, is without merit.

4. Regarding the application of the amended Tribal Code, Twin City concedes that generally, courts of appeals must apply the law in effect at the time of their decision. Brief in Opposition at 13. However, Twin City attempts to invoke an exception to this rule – manifest injustice. *Id.* at 13-14. That attempt should be rejected, because that exception is inapplicable here.

This Court has held that retroactivity is essentially a question of legislative intent and that the manifest injustice exception only applies where the legislative intent is absent or ambiguous. *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711-716 (1974). In this case, the intent of the Tribal Council is clearly expressed in the amended code, and accordingly, courts should defer to it.

Moreover, even assuming *arguendo* that the legislative intent were unclear, Twin City has not shown that its rights would be unjustly impacted by the application of the amended code. For example, this is not a case where a party would be forced to relitigate the merits of a private dispute in a new forum after two and one-half years of litigation in another forum. *See, e.g., Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 805-807 (8th

Cir. 1981). Here, the dispute between Parisien and Twin City over the subcontract is unlitigated on its merits, and the Tribal Courts are the same forum in which the suit was initially filed.

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